

If the Court decided to hear an *Apache Stronghold* appeal, it would seem that its own statements about religious freedom would cut strongly in favor of reversing (or upholding an en banc reversal of) the Ninth Circuit's decision, which included reasoning utterly at odds with the Supreme Court's recent treatment of free exercise claims. The cost to Apache First Amendment freedoms would exceed those of the COVID-restricted churchgoers both in severity and in duration, since the loss would be total and permanent. Further, in its efforts to protect Oak Flat, the tribes have asked for far less than the right to effectively coerce others<sup>56</sup> into joining their religious rituals — they only want to preserve their sacred site. And if the government cannot even withhold its own funding in a way that might hinder children's religious education, surely it would be the height of hypocrisy to allow it to actively profit from the destruction of Oak Flat.<sup>57</sup>

Normatively, the current inertia of the Court's free exercise decisions is deeply troubling. Too often, the legal system allows Christians to use free exercise as a pretextual justification for discrimination, perhaps most frequently against the LGBTQ community,<sup>58</sup> or as an excuse to force their preferred policy outcomes upon others, such as by restricting access to contraceptives.<sup>59</sup> But the tight grip that conservative Christianity has on the Court's majority suggests that the race to broaden free exercise principles has only just begun.<sup>60</sup> So if the Supreme Court is determined to remove all government barriers to any practice, however harmful to others, that Christians insist is central to their religious beliefs, it should ensure that its free exercise jurisprudence also affords protections to those minority religions whose traditions are actually under serious threat. The Ninth Circuit's callous decision in *Apache Stronghold* stands

<sup>56</sup> See *Kennedy*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting).

<sup>57</sup> *Apache Stronghold*, 38 F.4th at 749.

<sup>58</sup> See, e.g., *Fulton*, 141 S. Ct. 1868; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

<sup>59</sup> See, e.g., *Hobby Lobby*, 573 U.S. 682; *Little Sisters Poor Saints Peter Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

<sup>60</sup> Millhisser, *supra*.

in stark contrast to the exceptional deference that the Supreme Court has given Christian practitioners in recent years. While the Court will not stand for government regulations that so much as ask Christians to spend money in a way that they would rather not,<sup>61</sup> the current state of the *Apache Stronghold* case indicates that, by contrast, costing tribes entire sacred sites that are actually central to their religious traditions is permissible. If the Court wants to maintain any appearance of providing equal protection, it must reverse *Apache Stronghold* unless an en banc Ninth Circuit does so first. Even if the Ninth Circuit rules correctly in the upcoming en banc review, the Supreme Court should consider granting certiorari and affirming that decision to help ensure the future protection of indigenous sacred sites.

#### Potential Consequences of *Apache Stronghold*

If the Court has no qualms about denying free exercise rights to non-Christian groups, it may at least have a selfish interest in preserving its own appearances. Already, the Court faces accusations about its own eroding legitimacy following decisions that seem to prioritize the entrenchment of Christian conservatism in the legal system over any coherent judicial philosophy.<sup>62</sup> Public trust in the judiciary rests at an all-time low among perceptions that the Supreme Court is too politically conservative.<sup>63</sup> A failure to reverse *Apache Stronghold* would only contribute to this accelerating decline in legitimacy — though the same has held true of other decisions that have not given the Court pause in its race to the right.<sup>64</sup>

<sup>61</sup> See *Hobby Lobby*, 573 U.S. 682.

<sup>62</sup> See, e.g., Jill Filipovic, *It's time to say it: the US supreme court has become an illegitimate institution*, GUARDIAN (Jun. 25, 2022), <https://www.theguardian.com/commentisfree/2022/jun/25/us-supreme-court-illegitimate-institution>; Spencer Bokart-Lindell, *Is the Supreme Court Facing a Legitimacy Crisis?*, N.Y. TIMES (Jun. 29, 2022), <https://www.nytimes.com/2022/06/29/opinion/supreme-court-legitimacy-crisis.html>; Adam Gopnik, *Highland Park and an Illegitimate Supreme Court*, NEW YORKER (Jul. 6, 2022), <https://www.newyorker.com/news/daily-comment/highland-park-and-an-illegitimate-supreme-court>; Robert Barnes, *Supreme Court, dogged by questions of legitimacy, is ready to resume*, WASHINGTON POST (Sept. 29, 2022), <https://www.washingtonpost.com/politics/2022/09/29/supreme-court-roberts-kagan-legitimacy/>.

<sup>63</sup> Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

<sup>64</sup> See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

But ultimately, the consequences of the Court's own appearances are secondary to the far more important stakes involving the status of tribal free exercise rights. The judiciary has a long history of stretching the reasoning of its precedents to more rapidly erode tribal sovereignty and other rights and has continued that tradition in recent decisions.<sup>65</sup> The leaps between *Lyng* (a decision largely filled with dicta), *Navajo Nation* (which purported, however erroneously, to only implicate subjective religious experiences<sup>66</sup>), and *Apache Stronghold* (which condones the outright physical destruction of an entire sacred site) have already been extreme. What future atrocities, in turn, would leaving *Apache Stronghold* intact enable?

In an article discussing the erosion of indigenous rights, former Associate Solicitor of the Interior Department Felix Cohen once remarked,

[L]ike the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.<sup>67</sup>

Through this lens, a decision like *Apache Stronghold* would normally seem to indicate that threats to religious free exercise will soon suffer more broadly within the United States. The Supreme Court, however, has firmly put that idea to rest. Perhaps, then, the case instead signals an incoming suppression of free exercise for non-Christian groups alone. Indeed, the courts have not nearly been so generous in their treatment of Muslim individuals bringing religious liberty challenges<sup>68</sup> compared to cases brought by Christians. Rather than ringing in an era of rolling back protections for free exercise, the *Apache Stronghold* canary may be warning that the Court intends to impose what is effectively a religious caste system.

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<sup>65</sup> See, e.g., *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

<sup>66</sup> *Navajo Nation*, 535 F.3d at 1063.

<sup>67</sup> Getches et. al., *supra*, at 7.

<sup>68</sup> See, e.g., *Dunn v. Ray*, 139 S. Ct. 611 (2019); *Trump v. Hawai'i*, 138 S. Ct. 2392 (2018).

Finally, even these broad concerns about the wellbeing of tribal free exercise should not obscure the specific harms at issue in *Apache Stronghold*. Thus far, the legal system has failed Oak Flat. The Ninth Circuit's decision will make the continuation of Apache religious traditions outright impossible.<sup>69</sup> The site itself will be left in ruins.<sup>70</sup> If the decision is allowed to stand, the government will have yet again gotten away with a blatant attempt to sell out tribal interests in a way that the courts have clearly demonstrated they would never tolerate if Christian practices were implicated.

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<sup>69</sup> Complaint at 28, *Apache Stronghold*, 519 F.Supp.3d 591 (No. 2:21-CV-00050-SPL).

<sup>70</sup> *Id.* 11.



**Applicant Details**

First Name	<b>Zachary</b>											
Middle Initial	<b>J</b>											
Last Name	<b>Tauscher</b>											
Citizenship Status	<b>U. S. Citizen</b>											
Email Address	<a href="mailto:ztauscher@jd23.law.harvard.edu">ztauscher@jd23.law.harvard.edu</a>											
Address	<table><tbody><tr><td><b>Address</b></td></tr><tr><td>Street</td></tr><tr><td><b>1654 Massachusetts Avenue, Apt 53</b></td></tr><tr><td>City</td></tr><tr><td><b>Cambridge</b></td></tr><tr><td>State/Territory</td></tr><tr><td><b>Massachusetts</b></td></tr><tr><td>Zip</td></tr><tr><td><b>02138</b></td></tr><tr><td>Country</td></tr><tr><td><b>United States</b></td></tr></tbody></table>	<b>Address</b>	Street	<b>1654 Massachusetts Avenue, Apt 53</b>	City	<b>Cambridge</b>	State/Territory	<b>Massachusetts</b>	Zip	<b>02138</b>	Country	<b>United States</b>
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Zip												
<b>02138</b>												
Country												
<b>United States</b>												
Contact Phone Number	<b>7034831393</b>											

**Applicant Education**

BA/BS From	<b>University of Virginia</b>
Date of BA/BS	<b>May 2018</b>
JD/LLB From	<b>Harvard Law School</b>
	<a href="https://hls.harvard.edu/dept/ocs/">https://hls.harvard.edu/dept/ocs/</a>
Date of JD/LLB	<b>May 25, 2023</b>
Class Rank	<b>School does not rank</b>
Law Review/Journal	<b>Yes</b>
Journal(s)	<b>Harvard National Security Journal</b>
	<b>Harvard Journal of Sports and</b>
	<b>Entertainment Law</b>
Moot Court Experience	<b>No</b>

**Bar Admission****Prior Judicial Experience**

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	Yes

### **Specialized Work Experience**

### **Recommenders**

Saris, Patti  
Honorable\_Patti\_Saris@mad.uscourts.gov  
Chen, Alexander  
achen@law.harvard.edu  
6173902656

Singer, Joseph  
jsinger@law.harvard.edu  
617-496-5292

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**ZACH TAUSCHER**

ztauscher@jd23.law.harvard.edu • (703) 483-1393 • 1654 Massachusetts Avenue • Cambridge, MA 02138

March 24, 2023

The Honorable Jamar K. Walker  
U.S. District Court for the Eastern District of Virginia  
Walter E. Hoffman U.S. Courthouse  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am currently a third-year student at Harvard Law School. A native of Virginia, I grew up in Fairfax County, attended the University of Virginia, and have a strong desire to clerk in Virginia. Prior to law school I worked for two years in government service for the FBI in the Washington, D.C. Field Office. After graduation, I will be working as an associate for Quinn Emanuel Urquhart & Sullivan, LLP.

Along with my background, I would offer my skills in legal research, writing, analysis, and leadership in this position. As an editor of the *Harvard National Security Journal* I have continuously honed my technical editing skills outside of clinical and coursework. I would also offer practical abilities such as motion writing, strategic thinking, and critical analysis developed through experiences with the LGBTQ+ Advocacy Clinic and the U.S. Attorney Clinic. Finally, I would bring communication, community-building, teaching, and leadership skills through my mentoring of first year students closely in legal research and writing and law school life as a member of the Board of Student Advisers.

Enclosed please find my resume, current law school transcript, and writing sample. Additionally, please expect letters of recommendation from the following people:

Prof. Joseph Singer  
Harvard Law School  
jsinger@law.harvard.edu  
(617) 496-5292

Prof. Alexander Chen  
Harvard Law School  
achen@law.harvard.edu  
(617) 390-2656

Hon. Patti Saris  
United States District Court  
District of Massachusetts  
Honorable\_Patti\_Saris@mad.uscourts.gov  
(617) 998-1045

I would sincerely appreciate the opportunity to interview with you. Thank you for your time and consideration.

Sincerely,



Zach Tauscher

## ZACH TAUSCHER

ztauscher@jd23.law.harvard.edu • (703) 483-1393 • 1654 Massachusetts Avenue • Cambridge, MA 02138

### EDUCATION

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#### HARVARD LAW SCHOOL, Cambridge, MA

J.D. Candidate, May 2023

Activities: Board of Student Advisers, Vice President of Ames Moot Court Competitions  
*Harvard National Security Journal*, Senior Online Editor  
Lambda  
LGBTQ+ Advocacy Clinic, Spring 2022  
U.S. Attorney Clinic – District of Massachusetts, Fall 2022

#### UNIVERSITY OF VIRGINIA, Charlottesville, VA

B.A. with Distinction in Art History and Biology, May 2018

Honors: Phi Beta Kappa  
Activities: School of Medicine, Infectious Diseases Department, Research Assistant

### EXPERIENCE

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#### QUINN EMANUEL URQUHART & SULLIVAN, LLP, Washington, D.C.

*Summer Associate*, Summer 2022

- Wrote memoranda and legal summaries regarding copyright, contractual rights, and current case law landscape related to art litigation and disputes
- Conducted legal research and analysis on white collar defense matters for major business clients
- Observed arbitrations and meetings, and participated in the summer Mock Trial Program

#### FEDERAL COMMUNICATIONS COMMISSION, Washington, D.C.

*Legal Intern*, Office of Commissioner Geoffrey Starks, Summer 2021

- Researched and wrote briefing sheets for monthly open meetings and for meetings with public sector officials and private sector parties.
- Drafted statements and tweets for the Commissioner related to enforcement actions and approved rules and orders.
- Participated in ex parte meetings with companies related to proposed rules, orders, or items of interest.

#### FEDERAL BUREAU OF INVESTIGATION, Washington, D.C.

*Operational Support/Center Technician*, Counterterrorism Branch, July 2018 – July 2020

- Provided foundational investigative information to case agents through database research and booking expertise.
- Led a team of five by scheduling and training new team members, providing ongoing mentorship, support, and feedback, and working with supervisors in the chain of command.
- Assisted with Command Post operations including coordinating with agency partners, tracking assets, communicating with agents in the field, and providing case information to agents in real time.
- Communicated with the public by taking complaint intake, answering questions, and writing threat reports.

*Honors Intern*, June 2016 – May 2018

- Researched, analyzed, and organized case data and intelligence in support of the Cyber Division and Art Crime Team.

### INTERESTS

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Visual art, museums, cultural heritage and property, and indigenous arts issues; Russian language and culture, Ukrainian heritage; Video games; National parks

Harvard Law School

Date of Issue: February 21, 2023  
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Record of: Zachary J Tauscher  
Current Program Status: JD Candidate  
Pro Bono Requirement Complete

JD Program				2505	Supreme Court Decision Making	H	2
Fall 2020 Term: September 01 - December 31					Singer, Joseph		
					Fall 2021 Total Credits:		13
1000	Civil Procedure 4	H	4		Winter 2022 Term: January 04 - January 21		
	Cohen, I. Glenn						
1001	Contracts 4	H	4	2016	The Role of the Article III Judge	P	2
	Bar-Gill, Oren				Griffith, Thomas		
1006	First Year Legal Research and Writing 4A	P	2		Winter 2022 Total Credits:		2
	Procaccini, Francesca				Spring 2022 Term: February 01 - May 13		
1003	Legislation and Regulation 4	H	4	2048	Corporations	P	4
	Freeman, Jody				de Fontenay, Elisabeth		
1005	Torts 4	H	4	2079	Evidence	H	4
	Goldberg, John				Lyovsky, Anna		
Fall 2020 Total Credits: 18				2861	Facts and Lies	H	2
Winter 2021 Term: January 01 - January 22					Saris, Patti		
1058	Leadership Fundamentals	CR	2	3011	Framing, Narrative, and Supreme Court Jurisprudence	P	2
	Westfahl, Scott				Jenkins, Alan		
Winter 2021 Total Credits: 2				8054	LGBTQ+ Advocacy Clinic	H	3
Spring 2021 Term: January 25 - May 14					Chen, Alexander		
1024	Constitutional Law 4	H	4		Spring 2022 Total Credits:		15
	Eidelson, Benjamin				Total 2021-2022 Credits:		30
1002	Criminal Law 4	H	4		Fall 2022 Term: September 01 - December 31		
	Gersen, Jeannie Suk			8017	Government Lawyer: United States Attorney Clinic	H	4
1006	First Year Legal Research and Writing 4A	P	2		Whiting, Alex		
	Procaccini, Francesca			2169	Legal Profession	H	4
2189	Music and Digital Media	P	2		Wilkins, David		
	Bavitz, Christopher			2190	National Security Law	H	2
1004	Property 4	P	4		Baker, James		
	Benkler, Yochai				Fall 2022 Total Credits:		10
Spring 2021 Total Credits: 16					Fall-Spring 2022 Term: September 01 - May 31		
Total 2020-2021 Credits: 36				2103	Government Lawyer	~	2
Fall 2021 Term: September 01 - December 03					Whiting, Alex		
2000	Administrative Law	H	4		Fall-Spring 2022 Total Credits:		2
	Freeman, Jody				Winter 2023 Term: January 01 - January 31		
2042	Copyright	P	4	2050	Criminal Procedure: Investigations	P	3
	Tushnet, Rebecca				Whiting, Alex		
2467	Gender Identity, Sexual Orientation, and the Law	H	3		Winter 2023 Total Credits:		3
	Chen, Alexander						

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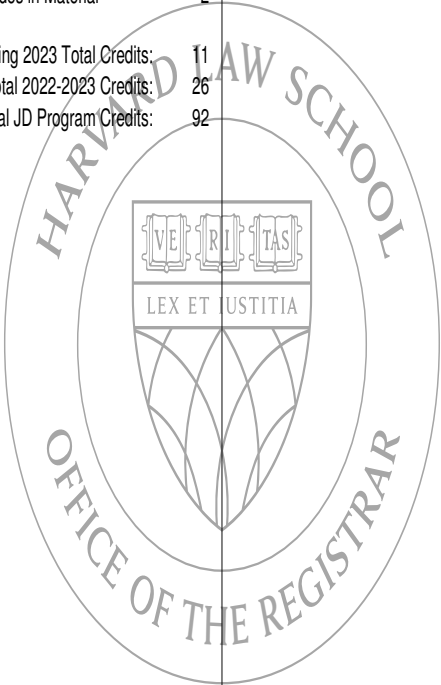
  
Assistant Dean and Registrar

Harvard Law School

Record of: Zachary J Tauscher

Date of Issue: February 21, 2023  
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Spring 2023 Term: February 01 - May 31			
2461	Comparative Law: Why Law? The Experience of China	~	4
	Alford, William		
2086	Federal Courts and the Federal System	~	5
	Fallon, Richard		
FAS-109230	MEDVLSTD 250 - At Cross Purposes: The Crusades in Material Culture	~	2
		Spring 2023 Total Credits:	11
		Total 2022-2023 Credits:	26
		Total JD Program Credits:	92
End of official record			



  
Assistant Dean and Registrar

**HARVARD LAW SCHOOL**  
Office of the Registrar  
1585 Massachusetts Avenue  
Cambridge, Massachusetts 02138  
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[www.law.harvard.edu](http://www.law.harvard.edu)  
[registrar@law.harvard.edu](mailto:registrar@law.harvard.edu)

Transcript questions should be referred to the Registrar.

~~~~~  
**In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.**  
~~~~~

A student is in good academic standing unless otherwise indicated.

**Accreditation**

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

**Degrees Offered**

J.D. (Juris Doctor)  
LL.M. (Master of Laws)  
S.J.D. (Doctor of Juridical Science)

**Current Grading System**

**Fall 2008 – Present:** Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

**Dean's Scholar Prize (\*):** Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

**Rules for Determining Honors for the JD Program**

*Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.*

**May 2011 - Present**

<i>Summa cum laude</i>	To a student who achieves a prescribed average as described in the <u>Handbook of Academic Policies</u> or to the top student in the class
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipient(s)
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

**Prior Grading Systems**

**Prior to 1969:** 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67 (B-), 60-64 (C), 55-59 (D), below 55 (F)

**1969 to Spring 2009:** A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

**Prior Ranking System and Rules for Determining Honors for the JD Program**

*Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.*

Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

<b><u>1969 to June 1998</u></b>	<b><u>General Average</u></b>
<i>Summa cum laude</i>	7.20 and above
<i>Magna cum laude</i>	5.80 to 7.199
<i>Cum laude</i>	4.85 to 5.799

**June 1999 to May 2010**

<i>Summa cum laude</i>	General Average of 7.20 and above (exception: <i>summa cum laude</i> for Class of 2010 awarded to top 1% of class)
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipients
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

**Prior Degrees and Certificates**

LL.B. (Bachelor of Laws) awarded prior to 1969.

The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

  
Assistant Dean and Registrar

March 23, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to highly recommend Zachary Tauscher for a clerkship. He is an excellent writer and made insightful comments the in class I taught at Harvard Law School. He received an Honors in the class.

As mentioned, Zach was a student in my seminar, Facts and Lies, during the spring 2022 at Harvard Law School. We met twelve times in a small group. The course focused primarily on the role of the trial court in finding facts, the tools used to assess credibility, problems with memory and implicit bias, and the doctrines which punish lying. We also addressed appellate review of agency factfinding and the standards of appellate review of factual questions, in particular in constitutional areas and mixed questions of fact and law. We talked about the role of the "managerial" trial judge.

I required extensive writing. Each student drafted a memorandum in support of a motion to dismiss, in opposition, and a memorandum on a summary judgment motion. Students also submitted response papers to the readings.

Zach's written product was consistently excellent. His final Memorandum was well written. He drafted a memo on a motion for summary judgment in a civil rights action involving the qualified immunity doctrine. His factual narrative was excellent; he used the factual record well. His legal analysis was also well done. His response papers analyzing the legal analysis were thorough and insightful.

I have no reservations about recommending Zach. Please call if there are any questions.

Very truly yours,

/s/ Patti B. Saris  
U.S. District Judge

Patti Saris - Honorable\_Patti\_Saris@mad.uscourts.gov



March 24, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

My name is Alexander Chen and I am the Founding Director of the Harvard Law School LGBTQ+ Advocacy Clinic (the "Clinic"), as well as a Lecturer on Law at Harvard Law School. I write to recommend Zach Tauscher for a clerkship in your chambers. Zach was a student in my Gender Identity, Sexual Orientation, and the Law class in the fall of 2021 and a student attorney in the Clinic in the spring of 2022. Through these experiences, I have observed Zach's

legal acumen and professionalism in work environments.

I assign a heavy workload of case reading and run my class via the Socratic method. LGBTQ+ law spans the gamut from family and health care law to criminal and constitutional law, and Zach was adept in his grasp of doctrine as we covered cutting-edge legal issues every week. Zach's strong exam performance earned him an Honors grade in my course.

As a student attorney, Zach also earned an Honors grade for his work in the Clinic. Zach worked on two matters: a complex class action impact litigation case involving insurance exclusions for transgender-related health care coverage, and a policy project involving TSA screening procedures for transgender travelers. With both projects, Zach displayed a conscientious approach to executing assigned legal research and writing tasks; good organization, note-taking, and punctuality in meetings with co-counsel and organizational partners; and agility in adapting on the fly to changing facts on the ground.

For these reasons, I believe Zach will be an asset to your chambers.

Please do not hesitate to reach out to me at (617) 390-2656 or [achen@law.harvard.edu](mailto:achen@law.harvard.edu) if you have any questions.

Sincerely,

Alexander Chen

Founding Director, Harvard Law School LGBTQ+ Advocacy Clinic

Alexander Chen - [achen@law.harvard.edu](mailto:achen@law.harvard.edu) - 6173902656

March 24, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

Zach Tauscher has asked me to write a recommendation in connection with his application for a judicial clerkship. I am happy to do so.

Zach was in a seminar I teach on Supreme Court Decision Making where the students act like the U.S. Supreme Court and as a state supreme court in a dozen cases. That very small class has only a dozen students. The students discuss and decide a dozen cases, and they write majority and dissenting and concurring opinions. We do six Supreme Court cases being heard by the Court during the current Term, and we do six made-up problems involving state law in several states, involving common law, statutes, and state constitutional law. The Supreme Court cases involve both statutory interpretation and federal constitutional law. For the federal cases, the students read the lower court opinions and the briefs that are available and any crucial statutes or cases that are being interpreted by the Court. For the state cases, the students read assigned cases, statutes, and state constitutional provisions and write opinions as if they are the supreme court of the relevant jurisdiction. We discuss each case twice. The first time we pretend we are at conference after oral argument and taking an initial vote on the case, and each student explains whether they would affirm or reverse and what they think an opinion should say. Then the student in charge spends the next two weeks writing a proposed majority opinion; the others write dissenting and concurring opinions. We meet to discuss the case a second time, to discuss the written opinions.

Zach did a great job in the class. He worked very hard, was completely prepared for class, knew the legal issues and the background law thoroughly, and was thoughtful in his decision making and in coming up with presentable arguments on how to decide the cases. His writing was clear and persuasive and showed care both with legal doctrine and with policy arguments supporting his interpretation of ambiguous legal materials. His final opinion was in the case of *Cummings v. Premier Rehab Keller*, a complex case about whether emotional distress damages were available under a federal civil rights statute. His opinion was clear and well written, and it carefully addressed precedent, statutory text, and policy. Zach also listened to others in the class and was able to acknowledge what was plausible or even right about opposing positions while responding to those who would have crafted different rules or gone the other way. He was able to address and answer counterarguments both orally in class and in his various opinions that he drafted for the class.

Zach's record at Harvard Law School confirms that he is among our best students. The number of Honors grades he has received across multiple classes shows an ability to absorb different methodologies from different professors, to follow directions, and to analyze legal doctrine in ways that he has been taught. He enjoyed the time he spent working at the FBI and envisions returning to government service in some capacity after law school.

Zach was unfailingly polite and able to converse on divisive topics in a politic manner that showed he listened to competing arguments and was able to absorb them, and either concede what was right about them or explain what was wrong about them. I was impressed with his ability to communicate both orally and in writing and with his care in addressing the nuances of legal doctrine, statutory interpretation, and case analysis.

I am confident Zach will be an excellent law clerk.

Sincerely,

Joseph William Singer

Joseph Singer - jsinger@law.harvard.edu - 617-496-5292

**ZACH TAUSCHER**

ztauscher@jd23.law.harvard.edu • (703) 483-1393 • 1654 Massachusetts Avenue • Cambridge, MA 02138

**WRITING SAMPLE**

Drafted Spring 2022

The attached is a summary judgment motion drafted as a final exercise for the Spring 2022 course Facts & Lies. The memo was written with a set of resources, including an amended complaint, factual materials, and case law. The facts are based on a real district court case, but the arguments, positions, structure, and writing are my own work based on the assignment. Though written in an advocate's lens, the arguments presented do not necessarily represent my policy or normative views on included topics.

Zach Tauscher

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JUDITH GRAY,  
Plaintiff,

v.

THOMAS A. CUMMINGS AND  
TOWN OF ATHOL,  
Defendants.

Civ. No. 4:15-cv-10276-TSH

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION  
FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Officer Cummings, properly trained and certified at the Boylston Regional Police Academy, took reasonable steps to subdue a mentally unstable Ms. Gray and return her to the Hospital for treatment after her escape and refusal to cooperate. In her amended complaint, Plaintiff alleged that Defendant Officer Cummings violated her Fourth Amendment rights by using excessive force to detain her. Further, Plaintiff alleged the Town of Athol is responsible for Defendant Cummings' actions by its failure to train police officers in mental illness and proper use of tasers. Based on the undisputed facts, no reasonable juror could find that Officer Cummings acted with excessive force, or that the Town of Athol's training programs were adequately implemented. Moreover, qualified immunity attaches in this case since Officer Cummings did not violate Plaintiff's Fourth Amendment rights against excessive force, and even if so, was not acting under any clearly established law that an officer in the circumstances would have reasonably known. Accordingly, this court is required to grant summary judgment in favor of the Defendants on all counts and dismiss this case.

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## II. BACKGROUND

On the morning of May 2, 2013, the Athol Police Department received a call from Judith Gray, the Plaintiff, regarding a fight between her daughter and daughter's boyfriend. Compl. at ¶ 9. At that time, Plaintiff's daughter told officials about her mother's mental illness and verbally aggressive behavior. *Id.* The Athol Police Department was aware and had prior experience of Plaintiff's erratic behavior having responded to other calls previously. *Id.* at ¶ 7, 8. After responding to the scene, officers decided to transport Plaintiff to the hospital in their cruiser. *Id.* at ¶ 9, 11. At the time of transport, plaintiff was in a highly agitated state and in the middle of a bipolar manic episode. *Id.* at ¶ 12.

After arriving at the hospital, Plaintiff fled hospital care some hours later. *Id.* at ¶ 13. Athol Memorial Hospital called the Athol Police Department to report a "Section 12" patient, Plaintiff, had left the hospital and needed to be returned. Doc 42 at ¶ 4; Ex. B at 2. A "Section 12" patient is one who is civilly committed for being a danger to themselves or others. Doc 42 at ¶ 5. Officer Cummings was then dispatched to locate and retrieve the Plaintiff. *See id.* at ¶ 7. Shortly after the call, Officer Cummings saw a woman matching plaintiff's description and approached her. Compl. at ¶ 19, 20. Plaintiff has no memory of her physical encounter with Officer Cummings and is unable to dispute the accuracy of Officer Cummings' police report because she is unsure what occurred since she was in "full-blown manic phase" at the time. Doc 42 at ¶ 2, 3.

Once Officer Cummings saw the Plaintiff walking along the sidewalk, he pulled over and began to step out of his cruiser. *Id.* at ¶ 9. Immediately, the Plaintiff shouted, "Fuck you!" at Officer Cummings. *Id.* at ¶ 10. Officer Cummings responded by telling Plaintiff that she needed to return to the Hospital, but she continued yelling at Officer Cummings, saying she would not return to the Hospital and continued walking while being uncooperative. *Id.* at ¶ 11, 12, 14. For about 25

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seconds, Officer Cummings followed Plaintiff, continuously explaining that she needed to return to the Hospital and asking her to stop, to all of which she continued yelling at Officer Cummings and kept walking. *See id.* at ¶ 15-19. At this point, Plaintiff abruptly stopped a few feet in front of Officer Cummings, clinched her fists and teeth, yelling at Officer Cummings and began quickly approaching him. *Id.* at ¶ 20-23. Officer Cummings braced and held out an arm to grab Plaintiff and keep her away from him. *Id.* at ¶ 24, 25. As she continued to push, Officer Cummings attempted to control her by taking her to the ground, tucking her arms, and ordering her not to resist. *See id.* at ¶ 26-28. Again, Plaintiff refused to comply and yelled at Officer Cummings, and he again ordered her to stop resisting or else she would get “tazed.” *See id.* at ¶ 29-32. After further refusal, Officer Cummings pulled out his department issued taser, set it to the localized “drive stun” mode, placed it on Plaintiff’s back, and pulled the trigger. *Id.* at ¶ 35-36; *see also* Ex. H, Dep. of Douglas Kaczmarczyk at 20. The “drive-stun” mode of the taser is a less painful mode that causes only localized pain, meant for assisting compliance, and not muscular incapacitation. *See* Doc 42 at ¶ 60; Ex. H at 20. Officer Cummings held the taser for approximately five seconds until the Plaintiff placed her arms behind her back and he placed her in handcuffs. Doc 42 at ¶ 38-39. At this point, back-up arrived, and no further force was used as they waited for an ambulance to arrive, though Plaintiff continued yelling. *See id.* at ¶ 40-47. Plaintiff was then taken by the ambulance and successfully returned to the Hospital. *Id.* at ¶ 48.

Prior to his interaction with Plaintiff, Officer Cummings graduated from the Boylston Regional Police Academy in 2011. *Id.* at ¶ 50-51. There, Officer Cummings received training on interacting with people with mental health issues. *Id.* at ¶ 52; *see also* Ex. D, Ans. 2, 3, 4, 5. The training included 12 hours of “Crisis Intervention and Conflict Resolution,” including dealing with emotionally disturbed persons (“EDP”), people with mental illness, and people with emotional

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illness. *Id.* at ¶ 54. Officer Cummings also received training in the “People with Special Needs” and “Persons with Disabilities and the Criminal Justice System” programs. *See id.* at ¶ 53, 55. Additionally, Officer Cummings received extensive training and certification in the use of tasers. *See id.* at ¶ 56; Ex. C; Ex. G. Officer Cummings was originally taser certified on September 7, 2012 and answered all questions correctly on the Police Academy certification test. *Id.* at ¶ 57, 59.

### III. STANDARD OF REVIEW

Summary judgment is appropriate when the moving party shows that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. R. 56(a). A genuine dispute exists when an issue must be decided at trial because evidence, viewed in light of the nonmoving party, would permit a rational factfinder to find for either party. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990). Once the moving party properly demonstrates with support that there is no genuine issue, the “adverse party must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment is also appropriate where a party “fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A moving party must show the absence of a genuine material fact, but “need not negate the elements of the nonmovant’s case.” *Id.* at 323.

### IV. ARGUMENT

#### A. Defendants are entitled to summary judgment on the ground of Qualified Immunity.

Qualified immunity is a doctrine recognized by the Supreme Court whereby officials are shielded from § 1983 civil liability so long as their conduct, “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Mullenix v.*

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*Luna*, 577 U.S. 7, 11 (2015) (per curiam) (internal citations omitted). Qualified immunity invokes a high standard, protecting “all but the plainly incompetent or those who knowingly violate the law.” *Id.* Qualified immunity is a fact and context specific inquiry and is not analyzed at a high level of generality. *See Ciolino v. Gikas*, 871 F.3d 296, 302 (1st Cir. 2017); *Mullinex*, 577 U.S. at 12. The test for qualified immunity is a two-step inquiry asking whether: 1) the facts shown make out a violation of a constitutional right; and 2) if so, the right was “clearly established” at the time of the defendant’s alleged violation. *See Ciolino*, 871 F.3d at 303. In this case, Plaintiff alleges a violation of her Fourth Amendment rights against excessive force. Since Officer Cummings acted with reasonable force, no Fourth Amendment violation occurred. Even if so, the law was not clearly established to put Officer Cummings on notice of the illegality of his particular actions. Therefore, qualified immunity is satisfied and must attach.

**1. Officer Cummings used reasonable force and did not violate the Fourth Amendment.**

When examining a § 1983 excessive force claim, this court follows the Fourth Amendment analysis laid out in *Graham v. Connor*, 490 U.S. 386 (1989). To establish a Fourth Amendment claim, a plaintiff must show that “the defendant employed force that was unreasonable under all the circumstances.” *Morelli v. Webster*, 552 F.3d 12, 23 (1st Cir. 2009) (citing *Graham*, 490 U.S. at 396). In *Graham*, the Supreme Court established three factors for evaluating reasonableness: 1) “the severity of the crime at issue”; 2) “whether the suspect poses an immediate threat to the safety of the officers or others”; and 3) “whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396; *Ciolino*, 871 F.3d at 302. This inquiry is one of “objective reasonableness,” judged from the perspective of a reasonable officer on the scene and in light of the specific “facts and circumstances confronting them, without regard to their underlying intent...” *Graham*, 490 U.S. at 396.



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Under the first *Graham* factor, Plaintiff did not originally commit a crime, and even in resisting likely committed a minor offense that weighs against the severity prong. However, this alone is not dispositive. Additionally, the Fourth Circuit has recognized that the first *Graham* factor can act a proxy for determining whether an officer had “any reason to believe [the subject] was a potentially dangerous individual.” *Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 900 (4th Cir. 2016) (finding that mental illness is a fact to consider and that fleeing from the Hospital, concerns of endangering passing cars, and using proportional force based on noncompliance and risk of resistance can be reasonable). Officer Cummings was aware Plaintiff was a “Section 12” patient, civilly committed for being a danger to themselves or others. The “severity” of the situation was exacerbated by Plaintiff’s mental state at the time of the arrest. While Plaintiff may have committed no prior crime, the principles underlying the reasonableness of force are present when the arrestee is in a significantly agitated mental breakdown.

Similarly, under the second *Graham* factor, the Plaintiff posed a danger to herself and others around her, making the use of appropriate force by Officer Cummings reasonable. Plaintiff, as in *Estate of Armstrong*, had fled the Hospital and was acting erratically next to the street. *See Estate of Armstrong*, 810 F.3d at 900. Moreover, Plaintiff was in a “full-blown manic phase.” Plaintiff was continuously moving away from Officer Cummings, and it was unclear where she would wander. Additionally, Plaintiff eventually turned and tried to violently confront Officer Cummings, who had to take defensive maneuvers. Therefore, all these circumstances point to the reasonable conclusion by Officer Cummings that Plaintiff posed a potential danger to those around her.

Finally, the third *Graham* factor weighs heavily in finding a reasonable use of force. The First Circuit has recognized that it is likely unreasonable to use a taser against a suspect who is

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largely compliant and not resisting arrest in a meaningful way. *See Parker v. Gerrish*, 547 F.3d 1 (1st Cir. 2008) (finding unreasonable force in using a taser where plaintiff insulted officers but complied and gave himself up for arrest after a DUI). However, it is reasonable to use force, including a taser, against a suspect who is noncompliant and actively resisting arrest. *See, e.g., Crowell v. Kirkpartrick*, 400 F. App'x 592, 594-95 (2d Cir. 2010) (affirming reasonable use of force where plaintiffs were arrested for minor crimes and were not actively threatening but were actively resisting arrest at the time they were tased); *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004) (holding that an officer reasonably used a taser when a driver yelled profanities, repeatedly refused to comply with the officer's verbal commands, and was hostile and uncooperative from the start).

This case falls squarely into the latter, reasonable use of force scenario. Officer Cummings attempted multiple times to ask Plaintiff to comply and return to the Hospital, but she was completely noncompliant from the start and was moving away from Officer Cummings. Quite similarly to *Draper*, Plaintiff continuously cursed at Officer Cummings, told him she would not return to the Hospital as he explained, and was uncooperative with any verbal commands Officer Cummings gave. Moreover, even when she turned to confront Officer Cummings, she continued to yell and resist arrest while being physically detained. Officer Cummings warned Plaintiff that she would be tased, but she still refused to comply. Even when he had to resort to using a taser, Officer Cummings' use is distinguishable from other unreasonable uses (as in, e.g., *Parker*). Officer Cummings did not use the full voltage force, but instead a localized stun setting that reduces pain and is used for more targeted scenarios. Thus, Officer Cummings use of a taser was reasonable on its face, but even more so when the effects of the taser were mitigated by a proportionate dialing down of power and single five second deployment. Therefore, the third

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*Graham* factor weighs heavily in favor of finding a reasonable use of force. Given its significant weight, and the aggravating circumstances in the first and second factors, it is clear that Officer Cummings used a reasonable amount of force to arrest Plaintiff and did not violate her Fourth Amendment rights.

**2. Even if there was a Fourth Amendment violation, the Fourth Amendment right was not clearly established at the time of the arrest.**

A clearly established right is one that “is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Mullenix*, 577 U.S. at 11. “Clearly established” is not defined at a high level of generality, but in the specific context of the case and *particular* conduct. *See id.* at 12. When determining whether the right violated was “clearly established” there are two elements to consider. *See Ciolino*, 861 F.3d at 303. This court asks whether 1) “the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right,” and 2) “in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right.” *Id.* The first element is easily satisfied since this court’s case law has a “crystal clear” articulation of the right against the use of excessive force by an arresting officer. *See id.* However, the second element asks whether a reasonable officer would have understood Officer Cummings’ actions of taking Plaintiff to the ground and tasing her to effectuate an arrest after numerous verbal outbursts, noncompliance, and physical resistance were unconstitutional under the circumstances.

No case law clearly establishes that the actions taken by Officer Cummings would be unconstitutional, thus no reasonable officer in his position could have understood so. No decisions from the Supreme Court or the First Circuit have clearly established that an officer’s use of a taser constituted excessive force under these circumstances. *See also Oliver v. Fiorino*, 586 F.3d 898,

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907 (11th Cir. 2009) (“We have said many times that ‘if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.’”). All potentially relevant cases from the First Circuit are plainly distinguishable in their fact patterns, most importantly regarding the fact of resistance. *See, e.g., Ciolino*, 861 F.3d at 304 (using force to arrest after no chance was given to submit peacefully and no physical or active resistance was offered); *Morelli v. Webster*, 552 F.3d 12 (1st Cir. 2009) (detaining a plaintiff to the point of injury with no evidence of danger or attempted flight); *Alexis v. McDonald’s Restaurants of Massachusetts, Inc.*, 67 F.3d 353 (1st Cir. 1995) (violently grabbing plaintiff out of a booth without asking for compliance first and without physical resistance); *Parker v. Gerrish*, 547 F.3d 1 (1st Cir. 2008) (using a taser where plaintiff insulted officers but complied and gave himself up for arrest after a DUI). Even if using a taser on a noncompliant, mentally ill subject rose to the level of excessive force, the case law demonstrates that Officer Cummings would not have been on notice. Since Plaintiff was yelling, becoming physical, and refusing to return to the Hospital with Officer Cummings, significantly unlike any other factual pattern in the case law, Officer Cummings would not have clearly been aware his actions would violate a Fourth Amendment right. Therefore, the only reasonable conclusion is that the law here is not “clearly established” and that qualified immunity must apply.

**B. The Town of Athol did not fail to train Officer Cummings in interactions with the mentally ill or the use of tasers.**

There is no evidence to support a finding that the Town of Athol failed to train Officer Cummings properly. Failure to train carries the high burden of deliberate indifference. *See Connick v. Thompson*, 563 U.S. 51, 61 (2011). Deliberate indifference requires proof of that municipal policymakers disregarded the “known or obvious consequence” that a particular omission in their program would cause city employees to violate civil rights. *See id.* at 61. When there is actual or

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constructive notice of such a fact it amounts to “a decision by the [town] itself to violate the Constitution.” *See id.* at 61, 71. Since the amended complaint, Plaintiff has not offered evidence of any deliberate indifference. In fact, Plaintiff attempts to show that the use of a taser was unreasonable by pointing to the Athol Police Department’s own taser policy cautioning use in mental health situations. *See* Doc 48-1 at 38A. Moreover, Plaintiff admits that Officer Cummings received his required trainings and certifications focusing on mental health and the use of tasers as required by the Police Academy program but merely questioned the adequacy of the training or how much Officer Cummings actually understood. *See id.* at 52-60. Even if the Town of Athol could have conducted more hours of training and with more scenarios, this does not rise to the high bar of “deliberate indifference.” Additionally, Officer Cummings’ potential misunderstandings do not reflect on a decision by the Town of Athol. Officer Cummings successfully attended and passed all required courses and certifications on the use of tasers and on mental health, satisfying the attempts of the municipality to address these issues. Therefore, it is clear that the Town of Athol cannot be held liable for deliberate indifference under these facts.

## V. CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the court grant summary judgment in their favor on all claims on the grounds of qualified immunity.

**Applicant Details**

First Name	<b>Poojan</b>
Last Name	<b>Thakrar</b>
Citizenship Status	<b>U. S. Citizen</b>
Email Address	<a href="mailto:thakr008@umn.edu">thakr008@umn.edu</a>
Address	<b>Address</b>
	<b>Street</b>
	<b>1849 Washington Avenue S, Apt 202</b>
	<b>City</b>
	<b>Minneapolis</b>
	<b>State/Territory</b>
	<b>Minnesota</b>
	<b>Zip</b>
	<b>55454</b>
	<b>Country</b>
	<b>United States</b>

Contact Phone Number **6309156094**

**Applicant Education**

BA/BS From	<b>University of California-Berkeley</b>
Date of BA/BS	<b>December 2018</b>
JD/LLB From	<b>University of Minnesota Law School</b>
	<a href="http://www.law.umn.edu">http://www.law.umn.edu</a>
Date of JD/LLB	<b>May 10, 2024</b>
Class Rank	<b>33%</b>
Law Review/Journal	<b>Yes</b>
Journal(s)	<b>Minnesota Journal of Law, Science, and Technology</b>
Moot Court Experience	<b>Yes</b>
Moot Court Name(s)	<b>National Energy &amp; Sustainability Moot Court Competition</b>

**Bar Admission****Prior Judicial Experience**

Judicial Internships/  
Externships                      **No**  
Post-graduate Judicial  
Law Clerk                        **No**

### **Specialized Work Experience**

#### **Recommenders**

Powers, Melissa  
powers@lclark.edu  
Willardson, Niel  
willa012@umn.edu  
Rozenshtein, Alan  
azr@umn.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Poojan Thakrar**

thakr008@umn.edu | (630) 915-6094 | Minneapolis, Minnesota 55454

The Honorable Jamar K. Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker:

I am a third-year law student at the University of Minnesota Law School. I am excited to apply for a 2024-2025 clerkship in your chambers. I hope to work for you because of your long experience in public service. I also appreciate your emphasis on educating law students and nurturing law clerks. Moreover, I want to establish my career on the mid-Atlantic coast, where I am currently interning.

As an aspiring litigator with extensive writing, research, and litigation experience, I would be a strong addition to your chambers. I performed well in foundational courses ranging from Civil Procedure to Legislation and Regulation. I earned an A+ in my State Attorney General class, in which Minnesota Attorney General Keith Ellison described my final paper as extremely well-researched and well-written. I also earned an honor pass in my Law-in-Practice class, in which students developed practical skills such as witness deposition or settlement negotiation. These classes have taught me the basics of legal writing and judicial procedure.

I have also honed legal skills outside of the classroom. In my summer associate position with Stoel Rives, I conducted legal research and drafted memoranda and documents for energy law and administrative law matters. As a staff member of the *Minnesota Journal of Law, Science, and Technology*, I practiced cite-checking, research and writing skills. I earned an honors pass for my journal because of my diligent dedication towards legal writing. On the law school's competition moot court team, I wrote a brief for a hypothetical case file and competed against other universities. Our team reached the quarterfinal stage out of 40 teams.

Just as important as my academic credentials is my dedication to public service. This past school year, I have worked with two non-profit organizations: Earthjustice and Minnesota Center for Environmental Advocacy. I also served as Co-President of the South Asian Law Student Association to provide a support network for South Asian students at Minnesota Law. Because of my background, I can deeply appreciate the public impact of the law.

It would be my honor to have an opportunity to work in your chambers and learn from you. Professors Melissa Powers, Niel Willardson, and Alan Rozenshtein have submitted letters of recommendation on my behalf. Thank you for considering my application.

Respectfully,  
Poojan Thakrar



## Poojan Thakrar

thakr008@umn.edu | (630) 915-6094 | Minneapolis, Minnesota 55454

### EDUCATION

#### **University of Minnesota Law School**

J.D., Anticipated Business Law Concentration & Environmental Law Concentration  
Minnesota Journal of Law, Science, & Technology, Staff Member

**Minneapolis, MN**

*Aug 2021 – May 2024*

GPA: 3.647

Rank: Rank 60/236, Top 25<sup>th</sup> Percentile as of Spring 2023

Honors: Robina Public Interest Scholar; Dean's List; Honors in Minnesota Journal of Law, Science, and Technology; Honors & Excellent Performance in Law-in-Practice

Activities: South Asian Law Students Association, President  
Environmental and Energy Law Society, Alumni Relations Coordinator

#### **University of California, Berkeley**

B.S., Environmental Economics and Policy, Minor in Statistics,

Activities: BEACN, Phi Alpha Delta, Indian Students Association

**Berkeley, CA**

*Aug 2015 – Dec 2018*

### EXPERIENCE

#### **Duncan, Weinberg, Genzer & Pembroke**

*Summer Associate*

**Washington, DC**

*May 2023 – Present*

Conduct legal research and draft memoranda about interstate energy markets. Write portion of reply motion in regulatory hearing. Research precedent for witness substitution. Update natural gas treatise with current caselaw.

#### **Environmental & Energy Law Clinic, University of Minnesota**

*Certified Student Attorney*

**Minneapolis, MN**

*Aug 2022 – May 2023*

Assisted Minnesota Center for Environmental Advocacy (MCEA), Minnesota's largest environmental nonprofit, with four open projects. Supported MCEA's litigation against mining company applying for permits in Minnesota. Assessed administrative latitude of state agencies that may be used to further MCEA's climate goals.

#### **National Sustainability Moot Court Competition Team, University of Minnesota**

*Team Member*

**Minneapolis, MN**

*Aug 2022 – May 2023*

Competed in teams of three to dissect hypothetical case file. Wrote 40-page brief in moot court setting. Engaged in oral arguments against other schools in national competition. Reached Quarterfinal stage out of 40 teams.

#### **Earthjustice**

*Legal Extern*

**Remote**

*Aug 2022 – Dec 2022*

Performed legal research for coal ash and cryptocurrency projects. Analyzed the Resource Conservation and Recovery Act and its caselaw to determine limits and requirements of government agency's coal plant permitting procedure. Reviewed financial disclosures, investigated state regulatory proceedings, and tracked changes in state statutes to challenge validity of state agency's approvals in two separate states

#### **Stoel Rives**

*Summer Associate*

**Minneapolis, MN**

*May 2022 – Jul 2022*

Cited-checked documents for pro bono asylum work. Conducted biometric privacy 50 state survey. Finalized terms of solar financing contract. Scoped future of national biofuels policy. Wrote attorney-client privilege memorandum.

#### **SRECTrade**

*Reporting Operations Associate*

**San Francisco, CA**

*July 2020 – Aug 2021*

*Client Solutions Associate*

*Feb 2019 – June 2020*

Tracked legislative and regulatory changes in 8 different states to ensure compliance and scout for potential new markets. Oversaw monthly data-reporting and operational responsibilities for 50,000+ solar energy subsidy clients. Managed biannual marketing push that increased revenue by \$125,000. Managed reports in Excel and Salesforce and distributed to B2B partners. Resolved 300+ monthly residential and commercial client inquiries.

University of Minnesota Unofficial Transcript

Name : Thakrar,Poojan  
Student ID : 5186686  
Birthdate : 7 - 10

Print Date: 05/30/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities  
Program : Law School  
Plan : Law J D  
Degree Sought : Juris Doctor

\*\*\*\*\* Beginning of Law Record \*\*\*\*\*

**Fall Semester 2021**  
University of Minnesota, Twin Cities  
Law School  
Law J D

Course	Description	Attempted	Earned	Grade	Points
LAW 6001	Contracts	4.00	4.00	A-	14.668
LAW 6002	Legal Research & Writing	2.00	2.00	P	0.000
LAW 6005	Torts	4.00	4.00	A-	14.668
LAW 6006	Civil Procedure	4.00	4.00	A	16.000
LAW 6007	Constitutional Law	3.00	3.00	B+	9.999
TERM GPA :	3.689	TERM TOTALS :	17.00	17.00	15.00
					55.335

**Spring Semester 2022**  
University of Minnesota, Twin Cities  
Law School  
Law J D

Course	Description	Attempted	Earned	Grade	Points
LAW 6002	Legal Research & Writing	2.00	2.00	P	0.000
LAW 6004	Property	4.00	4.00	B+	13.332
LAW 6009	Criminal Law	3.00	3.00	B+	9.999
LAW 6013	Law in Practice: 1L	3.00	3.00	H	0.000
LAW 6018	Legislation and Regulation: 1L	3.00	3.00	A-	11.001
TERM GPA :	3.433	TERM TOTALS :	15.00	15.00	10.00
					34.332

**Fall Semester 2022**  
University of Minnesota, Twin Cities  
Law School  
Law J D

Course	Description	Attempted	Earned	Grade	Points
LAW 6062	Energy Law	3.00	3.00	A	12.000
LAW 6215	Environmental Law	3.00	3.00	B+	9.999
LAW 6923	Federal Reserve System	2.00	2.00	A-	7.334
LAW 7012	CL: Environmental & Energy Law	3.00	3.00	A	12.000
LAW 7048	Moot Court Competition Team	1.00	1.00	A	4.000
Course Topic:	National Energy Comp Team				
LAW 7602	Jrnl of Law Sci&Tech: Rsch&Wrt	1.00	1.00	H	0.000
LAW 7609	Independent Field Placement	3.00	3.00	P	0.000
TERM GPA :	3.778	TERM TOTALS :	16.00	16.00	12.00
					45.333

**Spring Semester 2023**  
University of Minnesota, Twin Cities  
Law School  
Law J D

Course	Description	Attempted	Earned	Grade	Points
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LAW 6051	Business Associations/Corps	4.00	4.00	B	12.000
LAW 6650	Advanced Administrative Law	3.00	3.00	B+	9.999
LAW 6821	Public Int Advocacy & State AG	2.00	2.00	A+	8.666
LAW 6901	Energy and Utility Law	2.00	2.00	A	8.000
LAW 7012	CL: Environmental & Energy Law	3.00	3.00	A	12.000
LAW 7048	Moot Court Competition Team	1.00	1.00	A	4.000
Course Topic:	National Energy Comp Team				
LAW 7602	Jrnl of Law Sci&Tech: Rsch&Wrt	1.00	1.00	H	0.000
TERM GPA :	3.644	TERM TOTALS :	16.00	16.00	15.00
					54.665

**Fall Semester 2023**  
University of Minnesota, Twin Cities  
Law School  
Law J D

Course	Description	Attempted	Earned	Grade	Points
LAW 6081	Constitutional Law: 14th Amend	3.00	0.00		0.000
LAW 6100	Basic Federal Income Tax	3.00	0.00		0.000
LAW 6152	Federal Jurisdiction	3.00	0.00		0.000
LAW 6665	PR - Government	3.00	0.00		0.000
LAW 7600	MN Jour Law, Sci & Tech Editor	2.00	0.00		0.000
TERM GPA :	0.000	TERM TOTALS :	14.00	0.00	0.00
					0.000

<b>Law Career Totals</b>					
CUM GPA:	3.647	UM TOTALS:	78.00	64.00	52.00
		UM + TRANSFER TOTALS:		64.00	189.665

\*\*\*\*\* End of Transcript \*\*\*\*\*

Northwestern School of Law  
of Lewis & Clark College

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Portland, Oregon 97219  
Phone 503-768-6600  
law.lclark.edu



March 1, 2023

Re: Letter of Recommendation for Poojan Thakrar

To Whom It May Concern:

I write this letter of recommendation in support of Poojan Thakrar's (Poojan's) application to become a judicial clerk in your chambers. Poojan is an intelligent, hard-working, motivated, and thoughtful law student. I believe he would be an excellent judicial clerk and that he would benefit greatly from the experience.

As a visiting professor at the University of Minnesota, I had the pleasure of teaching Poojan in an energy law class, and I served as Poojan's faculty advisor for an externship he held with Earthjustice. In class, Poojan stood out as an inquisitive, studious, and attentive student. He was always prepared for class, and he regularly contributed to the class discussion with insightful responses and thoughtful questions. He received top scores on quizzes and the final exam, and these grades are testament to Poojan's ability to master complex legal issues. Poojan was also a diligent advisee during this externship. Although my role as extern advisor was somewhat limited, Poojan's journal entrees demonstrated his ability to be open-minded, curious, and fair. Poojan is also a good writer and researcher who communicates complex ideas with precision and clarity. Finally, he readily accepts feedback, and he is eager to improve his work in response to editing and constructive suggestions. Based on Poojan's performance in the classroom and during his internship, I think he would be an excellent judicial clerk.

I highly recommend Poojan for a judicial clerkship. Please contact me at [powers@lclark.edu](mailto:powers@lclark.edu) if you would like to discuss his qualifications in more detail.

Sincerely,

Melissa Powers  
Jeffrey Bain Faculty Scholar and Professor of Law  
Faculty Director, Green Energy Institute  
Lewis & Clark Law School  
Portland, Oregon  
[powers@lclark.edu](mailto:powers@lclark.edu)

June 01, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to strongly recommend Poojan Thakrar, a J.D. student at the University of Minnesota Law School, who will be graduating in May 2024, for a judicial clerkship.

I had the opportunity to teach Poojan in the Federal Reserve System Law in Policy Seminar in Spring Semester 2022. I've served as Senior Vice President and General Counsel at the Federal Reserve Bank of Minneapolis for 17 of my 32 years at the Fed, and have been an adjunct professor for more than thirty years.

From the very beginning of class, Poojan stood out as a strong student who demonstrated a deep understanding of the subject matter and consistently contributed thoughtful comments to our class discussions. His final paper on "To What Extent Can the U.S. Federal Reserve System Intervene in Climate Change Policy?" was outstanding. The paper insightfully recognized the limited statutory role of the Fed in certain aspects of climate change, suggesting that it did not have authority of some central banks for "green" initiatives. At the same time, he noted that the Fed's powers to research and determine effects on financial markets included key authority in this emerging area. I found it helpful that Poojan focused on statutory and regulatory authority primarily, and then turned to policy implications, not the other way around.

In short, Poojan has mastered legal analysis as demonstrated by his well-researched, organized and clearly written final paper. At the same time, he responded well to feedback from me, suggested an ongoing willingness to learn, a key attribute for any judicial law clerk or aspiring lawyer.

In addition to Poojan's academic achievements, Poojan is also highly involved in leadership and extracurricular activities at the University of Minnesota Law School. Poojan is the current President of the South Asian Law Students Association and has worked to promote diversity and inclusion in the law school community. Poojan has also served as a Certified Student Attorney for the Environmental and Energy Law Clinic and was a valuable member of the University of Minnesota National Sustainability Moot Court Competition Team.

These experiences have provided Poojan with a broad range of skills and perspectives that will undoubtedly serve him well as a judicial clerk.

In conclusion, I strongly recommend Poojan Thakrar for a judicial clerkship. Poojan is an exceptional student with a strong academic record, with excellent research and writing skills. He also has a personal commitment to excellence, leadership, and diversity. All of these attributes suggest to me that he will be an asset to any judge fortunate to have him as a clerk.

Please do not hesitate to contact me at willa012@umn.edu or (612) 708-4711 if I can be of any assistance.

Sincerely,

Niel Willardson

Niel Willardson - willa012@umn.edu

## UNIVERSITY OF MINNESOTA

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April 11, 2023

Dear Judge:

I write to recommend Poojan Thakrar for a clerkship in your chambers. Poojan is talented, hardworking, and a pleasure to be around, and I am certain he will become a leader in the legal profession. I have no doubt that he will make a terrific addition to your chambers.

I met Poojan when he was in my class on statutory interpretation and administrative law ("Legislation and Regulation") in his second semester. Poojan's class participation was uniformly strong, and his final exam was marked by clear thinking, excellent writing, and a command of the material that only comes from diligent preparation, earning him an A- grade. Nor has Poojan's academic success been limited to my class. His performance is uniformly strong, placing him in the top third of the University of Minnesota Law School's talented class and earning him a spot on the Dean's List. Between his academic performance and the training in research, writing, and editing that Poojan is receiving on the Minnesota Journal of Law, Science, and Technology, I am confident that Poojan would perform well at the at the main activities of a law clerk: performing legal analysis, preparing legal memos, and assisting you in crafting judicial opinions.

In particular, I want to call out Poojan's skills as a writer. I am his faculty advisor for his law review note, and as such I have had the opportunity to observe how he approaches large writing projects. I have come away from the experience immensely impressed. Poojan picked a very complex topic for his note: how the Federal Energy Regulatory Commission (FERC) should calculate electrical utility rates. This topic requires not only explaining the applicable law but also a set of complex financial topics. Over successive drafts, Poojan embraced my feedback as to how to make his explanation clear and accessible to non-expert readers, and the result is truly impressive.

Poojan's commitment to lawyering for the public good is also quite notable. After studying environmental economics, policy, and statistics at the University of California at Berkeley, he spent several years working in the energy industry before coming to law school. While at the law school, where he is

a Robina Public Interest Scholar, Poojan has externed at Earthjustice, participated in the University of Minnesota National Sustainability Moot Court Competition Team, and has worked as a certified student attorney in the University of Minnesota Environmental and Energy Law Clinic. This summer Poojan will be working at Duncan Weinberg in Washington, D.C., a firm that focuses on national energy law matters, often in front of FERC. Poojan has a clear commitment to environmental work, and I'm excited to see how his trajectory unfolds.

In sum, I strongly recommend Poojan for a clerkship in your chambers. Please feel free to contact me if you should have any questions about Poojan or if I can be of assistance in any way.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A. Rozenshtein', followed by a long horizontal flourish.

Alan Z. Rozenshtein  
Associate Professor of Law  
azr@umn.edu

**Poojan Thakrar**

1849 Washington Ave S, Minneapolis, Minnesota, 55454  
thakr008@umn.edu | (630) 915-6094

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**Writing Sample**

This writing sample is a final essay for my Federal Reserve Systems Policy Class. We were able to choose the final essay topic, so I chose to write about whether the Federal Reserve has jurisdiction over climate change risks.

This paper is what I submitted to my professor and is solely my work. However, it has been shortened for brevity. Please let me know if you would like the full essay.

Poojan Thakrar

December 21, 2022

## THE GREEN MANDATE:

### To What Extent Can the U.S. Federal Reserve Intervene in Climate Change Policy?

#### I. Introduction

Climate change is a defining problem of the 21st century. Its effects will be far-reaching, from increased frequency and intensity of natural disasters<sup>1</sup> to a wave of climate migration.<sup>2</sup> The financial sector is also growing aware of its exposure to climate change risks. Titans of finance from Larry Fink to Chris Sacca have mused on the relationship between climate and finance.<sup>3</sup>

Central banks have also become increasingly aware of climate change's potential impact on the financial sector. Over the past several years, there has been a public debate between Federal Reserve officials, the American public, and larger international community about central banks' role in climate change. The Federal Reserve Board itself has been cautious about entering this debate. However, a November 2020 Federal Reserve Board official report listed climate change as a threat to the financial industry of the United States for the first time.<sup>4</sup>

That discourse has even inspired works of fiction. In 2020, author Kim Stanley Robinson published the *Ministry for the Future*.<sup>5</sup> In the novel, the protagonist can be seen traveling from

<sup>1</sup> See e.g. Daniel Pavlinovic, *Climate and weather related disasters surge five-fold over 50 years, but early warnings save lives*, UNITED NATIONS (Sep. 1, 2021), <https://news.un.org/en/story/2021/09/1098662>.

<sup>2</sup> See e.g. *Frequently asked questions on climate change and disaster displacement*, UNITED NATIONS (Nov. 6, 2016), <https://www.unhcr.org/uk/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html>.

<sup>3</sup> Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2020-blackrock-client-letter>. See also Dan Primack, *Top venture capitalist: "The climate is f'd"*, AXIOS (Aug. 16, 2021), <https://www.axios.com/2021/08/16/lowercarbon-climate-change-venture-capital>

<sup>4</sup> *Financial Stability Report*, FEDERAL RESERVE BOARD (Nov. 2020), at 58-59, <https://www.federalreserve.gov/publications/files/financial-stability-report-20201109.pdf>. See also Bryan Hamerschlag, *A "Green New Fed": How the Federal Reserve's Existing Legal Powers Could Allow It to Take Action on Climate Change*, 100 TEX. L. REV. 577, 579 (2022).

<sup>5</sup> Wailin Wong & Adrian Ma, *The carbon coin: A novel idea*, NPR (Nov. 17, 2022), <https://www.npr.org/2022/11/11/1136169902/the-carbon-coin-a-novel-idea>



central bank to central bank, convincing them to sign off on a new international currency called a “carbon coin.”<sup>6</sup>

Of course, not every societal problem can or should be addressed by the Federal Reserve. Still, there have been increasing calls from domestic politicians and international central banks to enact comprehensive policy changes aimed at combatting climate change. This paper examines to what extent the Federal Reserve can exercise its tools with climate change in mind.

First, I will examine two foreign central banks, the European Central Bank and the Bank of England, to track their progress on climate and what may be the underlying reason for their pioneering role. Then, I will examine the stalemated status of climate and central banking within the United States. Lastly, I will break the Federal Reserve’s actions into four component parts to examine to what extent the Federal Reserve has statutory authority to act and whether the Federal Reserve *should* act.

## **II. Foreign Progress on Climate and Central Banking**

*[Eliminated for brevity]*

## **III. Current State of Climate and Central Banking in the United States**

*[Eliminated for brevity]*

## **IV. Statutory Authority for the Federal Reserve to Act on Climate Change**

When debating the extent of the Federal Reserve’s authority on climate change, it can be helpful to break its functions into component parts. For some activities, such as the kind of research undertaken by the SF Fed, there is likely statutory authority to do so. However, for activities such as setting interest rates, the same cannot be said. I break the Federal Reserve’s actions into four parts: Research, Supervision and Regulation, Quantitative Easing, and

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<sup>6</sup> *Id.*

Monetary Policy. I then examine the statutory authority to act in those areas and evaluate whether the Federal Reserve *should* act in those areas.

I explicitly exclude some core functions mentioned previously, such as safe and secure payment systems, because of its tangential nature with respect to climate change.<sup>7</sup>

### A. Research

As mentioned previously, members of the Federal Reserve have already undertaken research efforts.<sup>8</sup> That research ranges from how businesses are assessing climate risk<sup>9</sup> to strategies for equitable finance<sup>10</sup>. That research has already received criticism from elected representatives.<sup>11</sup>

Despite that criticism, there is clear statutory authority for the Federal Reserve to continue and even accelerate these research efforts. Climate change is widely recognized as a risk to the stability of the financial sector. The Federal Reserve monitors the stability of the financial sector as part of the Financial Stability Oversight Council (FSOC), which was enacted in the Dodd-Frank Act to ensure stability in the financial sector.<sup>12</sup> FSOC has already identified climate change as a risk.<sup>13</sup> FSOC also has a clear statutory directive to “identify risks to the financial stability of the United States.”<sup>14</sup> Therefore, there is no doubt that the Federal Reserve can, at the very least, research climate issues

<sup>7</sup> Daly *supra* note **Error! Bookmark not defined.**

<sup>8</sup> *Supra* III A. Federal Reserve Branch of San Francisco.

<sup>9</sup> Jargalsaikhan *supra* note **Error! Bookmark not defined.**

<sup>10</sup> Ian Galloway & Elizabeth Mattiuzzi, *Strategies for Equitable Climate Finance*, FEDERAL RESERVE BANK OF SAN FRANCISCO (Jan. 12, 2021), <https://www.frbsf.org/community-development/blog/strategies-for-equitable-climate-finance/>.

<sup>11</sup> Toomey *supra* note **Error! Bookmark not defined.**

<sup>12</sup> 12 U.S.C. § 5322

<sup>13</sup> *Financial Stability Oversight Council Identifies Climate Change as an Emerging and Increasing Threat to Financial Stability*, US DEPARTMENT OF THE TREASURY (Oct. 21, 2021), <https://home.treasury.gov/news/press-releases/jy0426>

<sup>14</sup> 12 U.S.C. § 5322(a)(1)(A)

More than the Federal Reserve's authority to publish research about climate risks, it also should be researching in that area. Opponents like Senator Toomey have cautioned the Federal Reserve to venture into climate research at the risk of losing its independence and non-partisanship.<sup>15</sup> However, the Federal Reserve should be researching potential financial risks irrespective of its politicized nature. In fact, to abandon its climate research because of climate's politicized nature destroys the independence that Senator Toomey wishes to protect. That one political party does not fully appreciate the risks that climate change poses is not grounds to preventing research in the area.

## **B. Supervision and Regulation**

The Federal Reserve exercises much of its authority through regulation and supervision of a large number of financial institutions, including member banks and financial holding companies. Its statutory sources for regulation and supervision are numerous. However relevant statutory powers include the ability to: (1) "[examine] of accounts and affairs of banks"<sup>16</sup>, (2) require that banks "[write off] doubtful or worthless assets"<sup>17</sup>, (3) require that banks "submit reports... [about] its financial condition and systems for monitoring and controlling financial and operating risks"<sup>18</sup>, and (4) a two-fold authority to require stress-testing of banks<sup>19</sup>.

### **i. Climate Scenario Analysis**

Stress-testing has seen success abroad<sup>20</sup> which may be mirrored here. Specifically, the Federal Reserve announced a pilot climate-specific scenario analysis program starting in early

<sup>15</sup> Toomey *supra* note **Error! Bookmark not defined.**

<sup>16</sup> 12 U.S.C. § 248(a).

<sup>17</sup> 12 U.S.C. § 248(g).

<sup>18</sup> 12 U.S.C. § 1844(c)(1)(A)

<sup>19</sup> 12 U.S.C. § 5365 and 76 FR 74631. *See also Stress Tests*, FEDERAL RESERVE, <https://www.federalreserve.gov/supervisionreg/stress-tests-capital-planning.htm>.

<sup>20</sup> *Supra* II. A. The European Central Bank and II. B. The Bank of England.

2023<sup>21</sup>. The stress-test will model how firms' portfolios and business strategies respond to hypothetical climate scenarios.<sup>22</sup> Although the scenario analysis is akin to a stress test, it is distinct in that it has no consequences or implications for the tested banks.<sup>23</sup> Ordinary bank stress tests, on the other hand, have capital consequences for its banks.<sup>24</sup>

The Federal Reserve ostensibly has authority for this scenario analysis program, but should it exercise that authority? Senator Toomey again says no.<sup>25</sup> He writes that these tests are “first step toward pressuring banks into limiting loans to and investments in traditional energy companies.”<sup>26</sup> He continues that “There is no risk from global warming that banks aren't already fully capable of pricing into their decisions, and the Fed's intrusion into this process only underscores that the real risk is government.”<sup>27</sup>

However, Senator Toomey's statement that banks can adequately police themselves runs counter to historical events like the Great Recession, is contrary to the purpose of stress tests that were enacted in Dodd-Frank after the Great Recession, and is refuted by evidence. Much ink has been spilled about banks inability to adequately price climate risk. For example, Associate Law Professor Madison Condon has pointed out six systematic reasons why climate risk remains underpriced by both banks and shareholders.<sup>28</sup> They include shareholders' lack of access to fine-grain asset-level climate data, corporate managers' lack of incentive to discover information that

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<sup>21</sup> *Federal Reserve Board announces that six of the nation's largest banks will participate in a pilot climate scenario analysis exercise*, FEDERAL RESERVE BOARD (Sept. 29, 2022), <https://www.federalreserve.gov/newsevents/pressreleases/other20220929a.htm>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Pat Toomey, Toomey on Fed's New “Pilot Climate Scenario Analysis”: A Stress Test By Another Name, UNITED STATES SENATE COMMITTEE ON BANKING (Sept. 29, 2022), <https://www.banking.senate.gov/newsroom/minority/toomey-on-feds-new-pilot-climate-scenario-analysis-a-stress-test-by-another-name>

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Madison Condon, *Market Myopia's Climate Bubble*, 22 UTAH L. REV. 63, 66-70 (2022).

their stock prices are overvalued, and the fact that climate change's worst impacts occur "within the relevant horizon for valuing securities but outside of conventional risk assessment horizons for investors."<sup>29</sup> Many other institutions across the globe have detailed the potential risk that climate change poses to the bottom line and claimed that banks are underappreciating their impact.<sup>30</sup> Therefore, to allow banks to police themselves as Senator Toomey claims is no better than allowing a fox to guard a henhouse.

## ii. Balance Sheet Assessment

As mentioned earlier, some central banks have adjusting capital requirements, mandated disclosure requirements and enacted other balance sheet policies to favor green investments.<sup>31</sup> Moreover, the Federal Reserve has considerable oversight over examining banks' balance sheets and may want to ensure that banks are properly valuing their carbon-intensive assets in an increasingly-net-zero world. At this point however, the Federal Reserve should focus on climate scenario analysis before enacting any similar regulation for two reasons.

First, the effects of climate on balance sheets are still unknown; this will of course be illuminated more brightly after climate scenario analysis results come out next year, at which point this conclusion can be reassessed. If the results from the scenario analysis deem necessary, then the Federal Reserve can think about climate related capital requirements and other balance sheet measures.

Second, climate-related disclosure policies are already being considered by other agencies, such as the SEC.<sup>32</sup> Moreover, climate-conscious investors are seeing some success in

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<sup>29</sup> *Id.* at 68.

<sup>30</sup> Jones *supra* note **Error! Bookmark not defined.**. See also Fink *supra* note 3

<sup>31</sup> *Supra* II. A. The European Central Bank

<sup>32</sup> *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, US Securities and Exchange Commission (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46>.

suing fossil fuel companies for their activities. For example, the state of Massachusetts is in suit with ExxonMobil alleging violations of its consumer protection and misinformation statutes.<sup>33</sup> Therefore, the concerns that the Federal Reserve may have over the value of carbon-intensive assets are being adequately addressed by other branches of federal and state government.

### C. Quantitative Easing

Quantitative Easing (QE) is another policy tool the Federal Reserve can use for climate purposes. QE is the practice of central banks buying debt – whether government bonds, mortgage-backed securities (MBSs), or corporate bonds – to lower interest rates and therefore the cost of capital. Both the European Central Bank and Bank of England have used this to target green industries after being given explicit direction to include climate change in its monetary policy.<sup>34</sup> Domestically, this power is granted by Section 14 of the Federal Reserve Act<sup>35</sup> and, until recently, was only used narrowly on government bonds and MBSs.<sup>36</sup>

It is unlikely that the Federal Reserve will employ “Green QE” in the same way as its foreign counterparts. First, Section 14 of the Federal Reserve Act does not mention the purchases of private debt and only allows for the purchase of gold, government bonds, and MBSs.<sup>37</sup> Granted, the Federal Reserve did buy corporate bonds for the first time during the Covid-19 Pandemic. However, those actions were taken pursuant to section 13(3) of the Federal Reserve Act and the Federal Reserve’s Lender of Last Resort (LOLR) Authority.<sup>38</sup> The Federal Reserve’s LOLR authority is only available during “unusual and exigent circumstances.”<sup>39</sup> Some have

<sup>33</sup> AG Healey Issues Statement in Response to State’s Highest Court Rejecting Exxon’s Effort to Dismiss Climate Deception Lawsuit, Commonwealth of Massachusetts (May 24, 2022). <https://www.mass.gov/news/ag-healey-issues-statement-in-response-to-states-highest-court-rejecting-exxons-effort-to-dismiss-climate-deception-lawsuit>

<sup>34</sup> *Supra* II. A. The European Central Bank and II. B. The Bank of England.

<sup>35</sup> 12 U.S.C. 353 et seq.

<sup>36</sup> Parajon Skinner, *supra* note **Error! Bookmark not defined.** at 1328-29.

<sup>37</sup> 12 U.S.C. 353 et seq.

<sup>38</sup> Parajon Skinner, *supra* note **Error! Bookmark not defined.** at 1331

<sup>39</sup> 12 U.S.C. 343(A)

argued that this applies to climate change because the climate crisis needs “immediate action to avert danger” and “the physical risks and transition risks of climate change are present today.”<sup>40</sup> However, Section 13(3) almost certainly does not apply with respect to climate change. Unlike the Covid-19 Pandemic, Great Recession, or other instances in which 13(3) has been used, the climate crisis will not worsen over a matter of days or weeks. Without the Fed using its 13(3) powers for climate change, the financial system is still functioning as it should. Moreover, it would be repugnant to the principles laid out in *West Virginia v. EPA*.

The recent Supreme Court decision in *West Virginia v. EPA*, although not related to the Federal Reserve, may illuminate the bounds within which a government agency can act on climate change issues absent a clear Congressional mandate.<sup>41</sup> In its holding, the court struck EPA’s assertion that Section 111(d) of the Clean Air Act - which was historically not used to regulate climate change - gave the EPA authority to enact sweeping regulations on power plants.<sup>42</sup> The court cites previous caselaw to indicate, “[w]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>43</sup> In that same way, it is unlikely that Congress intended the Federal Reserve to buy climate companies’ bonds under sections 13(3) or 14 of the Federal Reserve Act.

#### **D. Monetary Policy**

Perhaps the Federal Reserve’s most prominent role is the Federal Open Market Committee’s (FOMC) ability to set economy-wide interest rates, most notably the federal funds rate. It does so pursuant to the dual mandate in Section 2(A) of the Federal Reserve Act: “[The

<sup>40</sup> Bryan Hamerschlag, A “Green New Fed”: How the Federal Reserve’s Existing Legal Powers Could Allow It to Take Action on Climate Change, 100 TEX. L. REV. 577, 579 (2022)

<sup>41</sup> *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)

<sup>42</sup> *Id.* at 2595.

<sup>43</sup> *Id.* at 2613 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

FOMC] shall... promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates”<sup>44</sup> This has been come to be known as the “Dual Mandate”.

Some, like Assistant Law Professor Christina Parajon Skinner, have argued that “be well within the FOMC’s policy authority to adjust, as necessary, the target federal funds rate” due to an “exogenous shock to the economy precipitated by sudden climate changes or severe weather events.” This is almost certainly true. After all, a disastrous wildfire or hurricane can have a debilitating effect on the national economy akin to other exogenous shocks that prompted interest rate adjustments, like Covid-19 or September 11.<sup>45</sup>

However, the most uncertain question is whether the Federal Reserve can set interest rates to combat the slower, gradual change of increasing global temperatures rather than a one-time outsized weather event. After all, officials like Mary Daly and Lael Brainard have pointed to research indicating how climate change can affect macroeconomic indicators like labor productivity.<sup>46</sup> However, even the most climate-hawking members would agree that this research is still in its early infancy. More research would have to be done about climate change’s macroeconomic effects before the FOMC can justify adjusting interest rates on its basis.<sup>47</sup>

## V. Conclusion

The Federal Reserve has already undertaken steps to study and address the impact of climate change on the financial industry. It is clear that the Federal Reserve has extensive authority for some activities, such as researching climate change and enacting climate scenario analysis. However, the statutory bounds of the Federal Reserve are tighter than that of the

<sup>44</sup> 12 U.S.C. § 225a.

<sup>45</sup> Christopher J. Neely, *The Federal Reserve’s Response to the Sept. 11 Attacks*, FEDERAL RESERVE BANK OF ST. LOUIS (Jan. 1, 2002), <https://www.stlouisfed.org/publications/regional-economist/january-2002/the-federal-reserves-response-to-the-sept-11-attacks>.

<sup>46</sup> Daly *supra* note **Error! Bookmark not defined.**. See also Brainard *supra* note **Error! Bookmark not defined.**.



European Central Bank and Bank of England. Therefore, the Federal Reserve is precluded from activities that their counterparts have undertaken, such as green quantitative easing. Nonetheless, the Federal Reserve will play an important role in the future of climate policy, with or without any more statutory direction from Congress.

**Applicant Details**

First Name	<b>Jonathan</b>											
Last Name	<b>Thomas</b>											
Citizenship Status	<b>U. S. Citizen</b>											
Email Address	<a href="mailto:blackwolfe13@gmail.com">blackwolfe13@gmail.com</a>											
Address	<table> <tr><td><b>Address</b></td></tr> <tr><td><b>Street</b></td></tr> <tr><td><b>15 S Jefferson St., Unit A</b></td></tr> <tr><td><b>City</b></td></tr> <tr><td><b>Lexington</b></td></tr> <tr><td><b>State/Territory</b></td></tr> <tr><td><b>Virginia</b></td></tr> <tr><td><b>Zip</b></td></tr> <tr><td><b>24450</b></td></tr> <tr><td><b>Country</b></td></tr> <tr><td><b>United States</b></td></tr> </table>	<b>Address</b>	<b>Street</b>	<b>15 S Jefferson St., Unit A</b>	<b>City</b>	<b>Lexington</b>	<b>State/Territory</b>	<b>Virginia</b>	<b>Zip</b>	<b>24450</b>	<b>Country</b>	<b>United States</b>
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<b>24450</b>												
<b>Country</b>												
<b>United States</b>												
Contact Phone Number	<b>(979) 204-8284</b>											

**Applicant Education**

BA/BS From	<b>Texas A&amp;M University</b>
Date of BA/BS	<b>December 2019</b>
JD/LLB From	<b>Washington and Lee University School of Law</b>
	<a href="http://www.law.wlu.edu">http://www.law.wlu.edu</a>
Date of JD/LLB	<b>May 10, 2024</b>
Class Rank	<b>Below 50%</b>
Law Review/Journal	<b>Yes</b>
Journal(s)	<b>Law Review</b>
Moot Court Experience	<b>Yes</b>
Moot Court Name(s)	<b>Davis Moot Court</b>

**Bar Admission****Prior Judicial Experience**

Judicial Internships/ Externships	<b>Yes</b>
--------------------------------------	------------

Post-graduate Judicial Law Clerk    **No**

### **Specialized Work Experience**

### **Recommenders**

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Jonathan Thomas**

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The Honorable Judge Jamar K. Walker  
Walter E. Hoffman United States Courthouse  
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Norfolk, VA 23510-1915

Dear Judge Walker,

I am a third-year law student at Washington and Lee University School of Law writing to apply for a judicial clerkship in your chambers. I am captivated by the application of the reparative, instructive, and guiding force of the courts to the issues faced by various members of modern society. I enjoy researching and applying legal solutions to these issues and boiling down the essential aspects of a case in concise writing. I would be thrilled to clerk in your chambers.

In addition to my passion for the impact of the courts, I also have the research and writing skills necessary to provide able assistance in your chambers. In my first-year summer internship, my primary duty was to research and write memoranda of law for my supervising attorneys. Following that experience, I further developed these skills through experiential courses and a seminar in my second year. My research and writing abilities earned me high marks in my classes, as well as a position on the Washington and Lee University Law Review. Furthermore, I will continue to hone these skills under the direction of administrative law judges with the EEOC during my judicial internship in the summer of 2023. My experience in writing everything from concise memoranda and research outlines on various legal topics to longer in-depth analyses of law and policy has sharpened my research and writing skills. I efficiently search for the most relevant information and apply the law and data that I find to differing facts with concision and recognition of the strengths and weaknesses of multiple positions. All of this experience has developed me into a strong writer and researcher who would immediately bring value to your chambers.

I am even-keeled, solutions-oriented, and process driven. When presented with difficult situations, I am resilient and always seek to better my approach to significantly improve results. In my first year at W&L Law, I struggled to meet the high standards that I set for myself. However, I took that difficult situation as an opportunity to improve myself and come back better. I pragmatically examined what I was doing wrong to see what I could adjust, and examined what I did well that could be improved. After making specific changes to my approach, I applied an improved strategy to my courses in my second year. As a result, I finished in the top thirty percent for the Fall semester and improved even further by placing in the top ten percent for the following Spring. In the workplace, I bring not only my improved habits, but also a resiliency and a pragmatic approach to my constant pursuit of improvement. I also bring a strong initiative to continually add value to any position that I am in. I will quickly learn how your court functions in order to complete necessary assignments without direction.

I would be thrilled for an opportunity to interview for a clerkship in your chambers. If you would like any other materials from me, such as a more academic writing sample, I will promptly send them to you. Thank you for your consideration.

Sincerely,  
Jonathan William Earl Thomas

**Jonathan W. E. Thomas**

15A S Jefferson St, Lexington, VA 24450 · 979-204-8284 · [thomas.j24@law.wlu.edu](mailto:thomas.j24@law.wlu.edu)

**EDUCATION**

**Washington and Lee University School of Law, Lexington, VA**

*Doctor of Jurisprudence Candidate, May 2024*

*Cum. GPA: 3.212 (Bottom 50%); Fall '22 GPA: 3.720 (Top 30%); Spring '23 GPA: 3.807 (Top 10%)*

*Lead Articles Editor, Washington and Lee Law Review*

*Advanced Administrative Litigation Clinic*

**Texas A&M University, College Station, TX**

*B.A., International Studies, May 2019*

*Concentration in Business and Commerce; Minor in German language/culture*

*Semester abroad at Universität Salzburg, Spring 2018*

**Honors and Awards:** *National German Honor Society*

**Activities:** *Memorial Student Center: Student Conference on National Affairs*

- *Delegates Subcommittee, 2016; Programming Subcommittee, 2017*

**WORK EXPERIENCE**

**Equal Employment Opportunity Commission, Charlotte Division**

June 2023 to Aug 2023

*Judicial Intern*

**Commonwealth's Attorney for Colonial Heights**

May 2023 to June 2023

*Third-Year Intern*

- *Will use Third-Year Practice Certificate to represent the Commonwealth in court.*

**Disability Rights Louisiana**

May 2022 to Aug 2022

*Legal Intern*

- *Researched and wrote memos on legal topics related to employment and insurance benefits, government regulation, and civil rights. Wrote Know-Your-Rights sheets to summarize inform future clients of their rights in employment situations, in the context of receiving government benefits, and when dealing with private or public organizations. Spoke with clients to assist with assessing their issues and worked with supervising attorney to decide how to address their needs.*

**Texas A&M University**

September 2018 to May 2019

*Lead Aggie Family Ambassador*

- *Organized Family Weekend in collaboration with team of four; coordinated with vendors, sold ads, acquired sponsorships, marketed for events, planned and led meetings for affiliated Student Organization; collaborated with Family Advisory Council on proposals for New Student Conference and family involvement at A&M.*

**Carpentry, College Station, TX**

September 2015 to July 2021

- *Trim carpenter, cabinet maker, and painter. Worked on remodeling projects in a team or independently, applied critical thinking to solve problems to complete various carpentry tasks. Averaged 25 hours per week as an undergraduate student and full-time when not in school.*

**LANGUAGE SKILLS AND INTERESTS**

- *Intermediate German (Speaking, Reading, Writing)*
- *Eagle Scout, Folk and Bluegrass, Woodworking, Dallas Mavericks Basketball*

Print Date: 06/09/2023

Page: 1 of 2

Student: Jonathan William Earl Thomas

Lexington, Virginia 24450-2116

WASHINGTON AND LEE  
UNIVERSITY

SSN: XXX-XX-9131

Entry Date: 08/30/2021

Date of Birth: 08/15/XXXX

Academic Level: Law

**2021-2022 Law Fall**

08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B-	4.00	4.00	10.68	
LAW 140	CONTRACTS	B	4.00	4.00	12.00	
LAW 163	LEGAL RESEARCH	C+	0.50	0.50	1.17	
LAW 165	LEGAL WRITING I	C	2.00	2.00	4.00	
LAW 190	TORTS	B	4.00	4.00	12.00	

Term GPA: 2.747

Totals:

14.50 14.50 39.85

Cumulative GPA: 2.747

Totals:

14.50 14.50 39.85

**2021-2022 Law Spring**

01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	C+	4.00	4.00	9.32	
LAW 150	CRIMINAL LAW	B-	3.00	3.00	8.01	
LAW 163	LEGAL RESEARCH	B-	0.50	0.50	1.34	
LAW 166	LEGAL WRITING II	B-	2.00	2.00	5.34	
LAW 179	PROPERTY	B	4.00	4.00	12.00	
LAW 195	TRANSNATIONAL LAW	B+	3.00	3.00	9.99	

Term GPA: 2.787

Totals:

16.50 16.50 46.00

Cumulative GPA: 2.769

Totals:

31.00 31.00 85.84

**2022-2023 Law Fall**

08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 663	Legal Method	P	1.00	1.00	0.00	
LAW 685	Evidence	A	3.00	3.00	12.00	
LAW 708	Financial Literacy For Lawyers	B-	1.00	1.00	2.67	
LAW 770	Employment Practices	A-	3.00	3.00	11.01	
LAW 801	Higher Education Practicum	A-	4.00	4.00	14.68	
LAW 865	Negotiations and Conflict Resolution Practicum	A	2.00	2.00	8.00	

Term GPA: 3.720

Totals:

14.00 14.00 48.36

Cumulative GPA: 3.050

Totals:

45.00 45.00 134.20

Print Date: 06/09/2023

Page: 2 of 2

Student: Jonathan William Earl Thomas

Lexington, Virginia 24450-2116

**2022-2023 Law Spring**

01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 671	Disability Law Seminar	A	2.00	2.00	8.00	
LAW 690	Professional Responsibility	A	3.00	3.00	12.00	
LAW 705	Remedies	A-	3.00	3.00	11.01	
LAW 716	Business Associations	A-	4.00	4.00	14.68	
<b>Term GPA: 3.807</b>			<b>Totals:</b>	12.00	12.00	45.69
<b>Cumulative GPA: 3.212</b>			<b>Totals:</b>	57.00	57.00	179.89

**2023-2024 Law Fall**

08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707L	Skills Immersion: Litigation		2.00	0.00	0.00	
LAW 817	Statutory Interpretation Practicum		4.00	0.00	0.00	
LAW 828	Trial Advocacy Practicum		3.00	0.00	0.00	
LAW 931	Adv Administrative Litigation Clinic (Black Lung)		5.00	0.00	0.00	
<b>Term GPA: 0.000</b>			<b>Totals:</b>	17.00	0.00	0.00
<b>Cumulative GPA: 3.212</b>			<b>Totals:</b>	57.00	57.00	179.89

<b>Law Totals</b>			Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:			57.00	57.00	3.212
External:			0.00	0.00	
Overall:			57.00	57.00	3.212

**Program:** Law**End of Official Transcript**



## WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.

The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.

The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

**Official transcripts**, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

### Undergraduate

**Degrees awarded:** Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commerce (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	} Superior.
A	4.00	
A-	3.67	
B+	3.33	} Good.
B	3.00	
B-	2.67	
C+	2.33	} Fair.
C	2.00	
C-	1.67	
D+	1.33	} Marginal.
D	1.00	
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

#### Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

#### Grade prefixes:

R	Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).
E	Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

#### Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

#### Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

**Dean's List:** Full-time students with a fall or winter term GPA of at least 3.400 and a cumulative GPA of at least 2.000 and no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

**Honor Roll:** Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

**University Scholars:** This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

### Law

**Degrees awarded:** Juris Doctor (JD) and Master of Laws (LLM)

Numerical	Letter	Points	Description
4.0	A	4.00	
	A-	3.67	
3.5		3.50	
	B+	3.33	
3.0	B	3.00	
	B-	2.67	
2.5		2.50	
	C+	2.33	
2.0	C	2.00	
	C-	1.67	
1.5		1.50	This grade eliminated after Class of 1990.
	D+	1.33	
1.0	D	1.00	A grade of D or higher in each required course is necessary for graduation.
	D-	0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5		0.50	This grade eliminated after the Class of 1990.
0.0	F	0.00	Receipt of D- or F in a required course mandates repeating the course.

#### Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

\* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.

\*\* Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

#### Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

**Course Numbering Update:** Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar  
Washington and Lee University  
Lexington, Virginia 24450-2116  
phone: 540.458.8455  
email: registrar@wlu.edu

  
University Registrar



## TEXAS A&amp;M UNIVERSITY

College Station, Texas 77843

## OFFICIAL ACADEMIC RECORD

09-JUN-2023

Name: Jonathan Earl Thomas

Date of Birth: 08/15/\*\*\*\*

SID: XXXXX9131

Course Level: Undergraduate

Degree Awarded Bachelor of Arts 14-DEC-2019

Major : International Studies

SUBJ NO. COURSE TITLE CRED GRD PTS R

## TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

Austin Community College - TX

Total Earned Credits 17.00

Blinn College

Total Earned Credits 10.00

University of Salzburg

Total Earned Credits 12.00

## INSTITUTION CREDIT:

## Fall 2016 - College Station

## Semester

ANTH 205	PEOPLES & CULT OF WRLD	3.00 B	9.00
ENGL 231	SURVEY OF ENGLISH LIT I	3.00 A	12.00
GERM 201	INTERMEDIATE GERMAN I	3.00 A	12.00
HIST 105	HISTORY OF THE U S	3.00 B	9.00
MATH 167	EXPLORATIONS IN MATH	3.00 C	6.00
MUSC 324	MUS IN WORLD CULTURES	3.00 A	12.00
Ehrs: 18.00 GPA-Hrs: 18.00 QPts: 60.00 GPA: 3.33			

## Spring 2017 - College Station

## Semester

GERM 202	INTERMEDIATE GERMAN II	3.00 A	12.00
INTS 201	INTRO TO INTS	3.00 A	12.00
PHIL 240	INTRODUCTION TO LOGIC	3.00 Q	0.00
POLS 206	AMER NATNL GOVT	3.00 C	6.00
Ehrs: 9.00 GPA-Hrs: 9.00 QPts: 30.00 GPA: 3.33			

## Fall 2017 - College Station

## Semester

GEOG 205	ENVIRONMENTAL CHANGE	3.00 Q	0.00
GEOG 304	ECONOMIC GEOGRAPHY	3.00 B	9.00
GERM 311	CONVERSATION	3.00 B	9.00
HIST 106	HISTORY OF THE U S	3.00 B	9.00
INTS 215	GLOBAL CINEMA	3.00 C	6.00
Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 33.00 GPA: 2.75			

## Spring 2018 - College Station

STUDY ABROAD: AUSTRIA

\*\*\*\*\* CONTINUED ON NEXT COLUMN \*\*\*\*\*

SUBJ NO. COURSE TITLE CRED GRD PTS R

## Institution Information continued:

## Fall 2018 - College Station

## Semester

FIVS 123	FORENSIC INVESTIGATIONS	3.00 Q	0.00
GEOG 205	ENVIRONMENTAL CHANGE	3.00 A	12.00
INTS 403	NATIONS & NATIONALISMS	3.00 A	12.00
MGMT 209	BUSINESS GOVT & SOCIETY	3.00 B	9.00
POLS 207	STATE & LOCAL GOVT	3.00 A	12.00
Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 45.00 GPA: 3.75			

## Spring 2019 - College Station

## Semester

ANSC 107	GENERAL ANIMAL SCIENCE	3.00 A	12.00
ENGL 396	STUDIES AMERICAN LIT	3.00 B	9.00
INTS 407	DIVERSITY GLOBALIZ WORLD	3.00 A	12.00
MGMT 309	SURVEY OF MANAGEMENT	3.00 B	9.00
SCSC 105	WORLD FOOD & FIBER CROPS	3.00 A	12.00
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 54.00 GPA: 3.60			

## Summer 2019 - College Station

## 1st Summer Session

ARTS 349	HISTORY OF MODERN ART	3.00 B	9.00
Semester			
AGEC 105	INTRO TO AG ECONOMICS	3.00 A	12.00
Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 21.00 GPA: 3.50			

## Fall 2019 - College Station

## Semester

AGEC 452	INTERNATNL TRADE &AGRI	3.00 B	9.00
INTS 301	THEORIES OF GLOBALIZATION	3.00 B	9.00
INTS 481	SEMINAR	3.00 A	12.00
Ehrs: 9.00 GPA-Hrs: 9.00 QPts: 30.00 GPA: 3.33			

\*\*\*\*\* TRANSCRIPT TOTALS \*\*\*\*\*

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	81.00	81.00	273.00	3.37

TOTAL TRANSFER 39.00 0.00 0.00 0.00

OVERALL 120.00 81.00 273.00 3.37

\*\*\*\*\* END OF TRANSCRIPT \*\*\*\*\*

This Record may not be released or transferred to any other person, agency or party without the student's written consent.

Transcript is official with digitized seal and signature of the Registrar.

JONATHAN THOMAS



Venesa A. Heidick  
Venesa A. Heidick  
Registrar

June 09, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am very happy that Mr. Thomas requested I be one of his recommenders because it is always a pleasure to support the application of an excellent student. Any judge would be lucky to have Mr. Thomas in their chambers, and I am sure he will be a great asset to any employer.

Mr. Thomas was a student in my Disability Law seminar in the Spring 2023 semester. This course required extensive analyses of law and policy and culminated in a substantial research paper. My expectations for these papers are quite high; I expect them to be publication-worthy, or very nearly so, with detailed and comprehensive analyses of relevant law, policy, and available data. I expect students to provide legislative and policy recommendations strongly supported by these analyses with detailed consideration of the various benefits and drawbacks of each recommendation.

Mr. Thomas distinguished himself from his classmates in his dedication to detail-oriented research and thorough analysis. Mr. Thomas chose a topic that was difficult to analyze due to the limited case law and lack of readily available data to support any legislative or policy recommendations. He was aware of the potential challenges of this topic from the beginning but was willing to put in the extra time and effort to pursue this research.

I met several times with Mr. Thomas during the paper drafting process to discuss this paper and the progress of his research. I was always impressed with his attention to detail and insistence on producing the strongest legal analysis possible, even when easier approaches were available and would have been adequate for a student paper. Mr. Thomas was willing to analyze the limited data supporting his research and develop it into compelling evidence to support his arguments and recommendations, even though this data was not originally in a form useful for legal and policy analysis. It would have been possible for Mr. Thomas to write his paper without this data, and I feel confident in saying that the majority of students would not have put in this extra time and effort.

During in-class discussions, Mr. Thomas displayed exceptional reasoning and argumentation skills. He is very conscientious and was always well prepared for class, having not only read but also thoughtfully analyzed the assigned readings. Mr. Thomas thinks well on his feet and can quickly identify the potential long-term implications of legal and policy decisions. He has a strong work ethic and is not content with anything less than excellence in his work. I am sure these skills will be of great value to Mr. Thomas as a law clerk and as a practicing attorney.

Please do not hesitate to contact me if I can be of any further assistance in your review of Mr. Thomas' application.

Sincerely,

Tiffany Lee

Adjunct Professor of Law  
Washington and Lee University School of Law  
tlee@wlu.edu

Tiffany Lee - tlee@wlu.edu - (573) 819-1607

WASHINGTON AND LEE UNIVERSITY  
SCHOOL OF LAW  
LEXINGTON, VA 24450

June 10, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter in strong support of Jonathan Thomas's application for a judicial clerkship.

I have had the pleasure of getting to know Mr. Thomas quite well as both his Remedies professor and as the teacher of an academic success class.

Mr. Thomas spirit and drive to improve and perform, as well as his execution, has literally wowed me. He has strong communications skills – both oral and writing. Likewise, his analytical skills are excellent. I have had numerous substantive legal and policy discussions with Mr. Thomas and can say without equivocation that he possesses rare insight, the ability to integrate and apply new information quickly, and excellent skills in reducing all this to legal analysis.

His arc in law school has been fascinating. In my capacity as an academic success instructor, I have encountered a number of students over the years who started more slowly than others in law school but by the second or third year were exceeding the performance of their classmates. Jonathan presents a special case. Like so many others, he did not do well academically in his first year—particularly the first semester. I am not sure what all the factors were, but I am aware that he was facing considerable challenges in his personal life at the time. The key thing is his extraordinary – one might say meteoric -- academic rise in his second year. Mr. Thomas rose from a GPA in the bottom ten percent of his class to a GPA at around the top quarter of the class! That sort of resiliency ("grit", I think they call it ) --the ability to rise from a setback or adversity – says a whole lot about a person. In my years teaching here at Washington and Lee, I've only seen a handful of other students make that sort of improvement in a single semester. All of them have gone on to become superlative lawyers.

I met with Jonathan several times during this process of self-improvement and can honestly say that he exhibited superb self-awareness, resolve , and execution. He is simultaneously realistic and aspirational. The outstanding results speak for themselves..

In short, Jonathan has the grit, determination, intelligence, writing skills, analytic ability, and character to be a fantastic clerk. One other thing I will say: Jonathan is the sort of person who will value and cherish the guidance and insight provided by a more senior mentor. That is also, in my view, one of the measures of successful clerkship.

Please let me know if there is any other context or information that I could supply in connection with Jonathan's clerkship application.

Sincerely,

David Eggert  
Professor of Practice

David Eggert - eggertd@wlu.edu - 540-458-8335





Petty, Livingston, Dawson & Richards

FRANK WEST MORRISON  
[fmorrison@pldrllaw.com](mailto:fmorrison@pldrllaw.com)  
434-846-2768 telephone  
434-847-0141 facsimile

[www.pldrllaw.com](http://www.pldrllaw.com)

May 30, 2023

Mailing Address:  
P.O. Box 1080  
Lynchburg, VA 24505

Street Address:  
925 Main Street  
Suite 300  
Lynchburg, VA 24504

RE: **Recommendation Letter for Jonathan Thomas**

Dear Sir or Madam:

It is my privilege to write this letter of recommendation in support of Jonathan Thomas. I have been practicing family law, mediation and collaborative law over the years since I graduated from Washington & Lee Law School in 1970. I have also been teaching as an adjunct professor at Washington & Lee Law School Negotiation and Conflict Resolution Skills for over 17 years and over the last several years have had the opportunity to teach approximately 80 students a year in my practicum course in Negotiation and Conflict Resolution Skills. Of the many students that I have taught over the years, Jonathan Thomas stands out as one of the best students that I have had the pleasure to teach based on his intelligence, hard work and demonstrated skills. In addition, Mr. Thomas is a wonderful person to work with, as he assisted me in my classes by joining me in Fish Bowl demonstrations to help the new students better understand the negotiation process. I am confident that Mr. Thomas will have a very successful legal career and will be positive influence in his community and in general to society because of the type of person he is and his abilities.

My course is very interactive with students performing many different negotiation and conflict resolution role plays and demonstrations and Jonathan, when he was my student, performed all of the interactive assignments, and the written analysis of such assignments, in a high quality manner.

For each of my classes, I pick a few former students to perform various demonstrations for my classes in order to help the current students learn how to be more effective negotiators and how to develop better effective conflict resolution skills. Mr. Thomas has served in that capacity this year for my classes a number of times and has been one of the best former students that I have ever used in this capacity in the various demonstrations he has done with other former students in my class. He is not only very skilled in his role in these demonstrations, but also quite frankly has great acting abilities, during which he is able to demonstrate his wonderful personality, charm, great sense of humor and knowledge.

In conclusion, if I were looking to hire an associate attorney at this time, Jonathan Thomas would be at the top of the list. I am certain that should you hire him, that he

Business Formation and Transition • Complex Litigation • Construction Law • Employment Law  
Corporate and Commercial Real Estate • Creditor's Rights and Bankruptcy • Taxation, Wills and Trusts

would make an excellent employee and that you would enjoy working with him in the same manner that I have. I therefore recommend him to you without any reservation.

Should you have any questions about Mr. Thomas, please do not hesitate to contact me at [fmorrison@pldrlaw.com](mailto:fmorrison@pldrlaw.com) or on my cell phone, 434-907-4805.

With kindest, personal regards, I am

Yours very truly,



Frank West Morrison

FWM/jls  
Enc.

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND  
JOHN MARSHALL COURTS BUILDING**

<b>COMMONWEALTH OF VIRGINIA</b>	)	
	)	
<b>v.</b>	)	
	)	<b>Case Nos:</b>
	)	
<b>JOHN DOE</b>	)	
	)	
<b>Defendant.</b>	)	

**Defendant's Motion in Limine to Bar Testimony of the Defendant's Ambiguous Head Nod  
and Silence in the Face of Police Accusation**

Defendant John Doe, by counsel, respectfully requests that this court exclude the testimony of the Commonwealth's police witness concerning the Defendant's ambiguous silent reaction to an accusation by the officer, pursuant to Virginia Rule of Evidence 2.403 as well as the Fifth Amendment to the United States Constitution.

**FACTUAL BACKGROUND**

Defendant's ex-wife was found dead in her home. For no stated reason, the police became suspicious of Defendant before the investigation began in earnest. Within hours of discovering the body, a detective went to Defendant's home to inform him of the death as well as to question him. Upon arrival, the detective informed Defendant that his ex-wife had been murdered and that the police already suspected him to be the culprit. The Government now wishes to have that officer testify that after he said this, the defendant nodded his head and looked down before asking for an attorney before he would answer questions. The government intends to use his silent reaction against him to lead the jury to infer that his emotional body language was actually an unemotional nod that affirmed his knowledge and guilt of his ex-wife's murder.

Jonathan W.E. Thomas

### ARGUMENT

1. **Testimony about Defendant's head nod should be barred because its meaning is too speculative and ambiguous to be relevant, it would confuse and mislead the jury, it would unfairly prejudice Defendant, and it would violate his Fifth Amendment rights.**

- A. **The nod is so speculative and ambiguous that it has no true relevance and would only confuse the jury.**

The testimony the Government seeks to offer regarding Defendant's head nod is so ambiguous that the jury would be forced to speculate on its meaning. Defendant's head nod could have had any number of meanings from which inferences supporting guilt are not more likely than inferences supporting innocence. Therefore, it would be error to allow the testimony.

Courts often bar evidence that forces a jury to speculate on a party's ambiguous conduct because of its lack of relevance and tendency to confuse and mislead a jury. This is especially true in instances where speculative testimony is being presented solely to give rise to an inference of the defendant's guilt. *See Varker v. Commonwealth*, 14 Va. App. 445, 448 (1992) ("Where an inference supporting guilt is no more likely to arise from a proven fact than one favoring innocence, the inference of guilt is impermissible."). In *Varker*, the court decided the admissibility of a defendant's non-verbal head nod while police were questioning him about the alleged crime. *Id.* The court found that the defendant's head nod, among other evidence, was inadmissible because it "does not create an inference of guilt" and "[i]t was a non-verbal expression that may have indicated only an acknowledgment or understanding of the information being conveyed." *Id.*

A particularly useful example comes from *United States v. Rodriguez-Cabrera*, 35 F. Supp. 2d 181, (D.P.R. 1998). In *Rodriguez-Cabrera*, the defendant was told by agents that he was under arrest. The defendant asked, "What's this all about?" *Id.* at 6. The agents answered vaguely by saying "[i]t's about the money." *Id.* The defendant then nodded. Later he pointed to a drawer when

asked where the money was. *Id.* at 11. The *Rodriguez-Cabrera* court banned the statement under the following reasoning:

However, we do suppress the nod on the basis that its meaning is entirely too ambiguous to be admitted into evidence. While Special Agent Johnson understood the nod to mean that Rodriguez-Cabrera had knowledge of the extortion money to which he referred, this is Johnson's subjective interpretation of the nod. There are many equally plausible explanations for Rodriguez-Cabrera's nod. Rodriguez-Cabrera could have meant the nod to communicate that he would cooperate during his arrest; that he acknowledged the agents' presence; or merely that he heard what Special Agent Johnson has said in response to Rodriguez-Cabrera's question, 'what is this about?' Simply put, the meaning of the nod is ambiguous and not sufficiently reliable to be admitted in evidence as a statement by the Defendant. There is no question that the prejudice that would flow from admission of the nod substantially outweighs the probative value.

*United States v. Rodriguez-Cabrera*, 35 F. Supp. 2d 181, 8-9 (D.P.R. 1998)

Many other courts in Virginia and other jurisdictions refuse to admit evidence of a proven fact that could support an inference of guilt, but when the jury would have to speculate upon many possible meanings. *See Brown v. Commonwealth*, No. 1223-21-1, 2022 Va. App. LEXIS 653, at \*15 (Ct. App. Dec. 20, 2022) (“[W]here the evidence leaves it indefinite which of several hypotheses is true, or establishes only some finite probability in favor of one hypothesis, such evidence cannot amount to proof, however great the probability may be.”); *see also Morton v. Commonwealth*, 13 Va. App. 6, 10 (1991) (finding that “[i]f there is other evidence of guilt,” evidence supporting an inference of guilt is admissible only if the inference, “is more likely than not to flow from the proved fact on which it is made to depend” . . . and that “if the only evidence of guilt is that which gives rise to the inference” then Virginia courts will require that “a rational relationship must exist, beyond a reasonable doubt, between the inference and the proved fact” for such evidence to be admitted); *Petrocelli v. Gallison*, 679 F.2d 286, 292 (1st Cir. 1982) (stating



that where an item is so ambiguous that “speculation is required to divine” how the jury should evaluate it, a trial judge should exclude the evidence under Fed. R. Evid. 403 on the ground that the danger of unfair prejudice from jury confusion substantially outweighed the record's probative value); *Naples v. United States*, 344 F.2d 508, 512 (D.C. Cir. 1964) (“Appellant allegedly responded to this lengthy statement either by remaining silent or by nodding his head ‘Yes.’ Either response gives little assurance that the appellant adopted, as his own admission, every detail of the statement or more particularly, that he adopted the statement that ‘he struck her.’”); *Reeves v. State*, 969 S.W. 2d 471, 492-93 (Tex. 1998) (“We agree that evidence that Reeves nodded his head at a time when Officer Lenoir was reciting distances is probative of nothing, and in fact, has little relevance. Because this testimony likewise had a tendency to mislead the jury and confuse the issues, we believe the court’s ruling in admitting the testimony was outside the zone of reasonable disagreement.”); *United States v. Wright*, 799 F.2d 423, 425 (8th Cir. 1986) (“The district court did not abuse its discretion in excluding Black’s testimony. The statement was ambiguous in that it would have required the jury to speculate as to what type of ‘content’ Gatewood allegedly gave Wright to hold.”).

In the present case, the testimony of Defendant’s head nod after being told by an officer that his ex-wife was murdered and that he was a suspect is so ambiguous that it demands speculation. There are many more probable meanings that support an inference of innocence, which flow naturally from the Defendant’s head nod, than any that support an inference of guilt. His nod could have been an acknowledgment of the information that he had just received. It could have been the reaction of a grief-stricken man, slumping his head down and looking toward the floor. It could have been a self-response to his own internal thought processes of how to handle a false claim of guilt. It could have been an indication of willingness to cooperate with police

questioning. It could have meant any number of things supporting an inference of innocence, but it has the inherent danger of leading the jury to infer that it was an admission of guilt when offered by the prosecution. The government is offering the testimony in order for the jury's necessary speculation to lead them to an inference of Defendant's guilt. There is no other relevant purpose for its admission. Such testimony serves only to confuse and mislead the jury creating severely unfair prejudice to Defendant. Therefore, this Court should bar its admission.

**B. In addition to being highly speculative, the testimony will mislead the jury into weighing it too heavily.**

Not only is the meaning of Defendant's head nod too speculative and ambiguous to be reliable or have any real relevance, the jury is also likely to give it too much weight.

Juries tend to place an extremely high weight on testimony of confessions and admissions of guilt, whether explicit or implicit. *Bruton v. United States*, 391 U.S. 123, 128-29 (1968). In *Bruton*, the Supreme Court found that testimony constituting an inadmissible confession is particularly damaging in the following statement:

[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

*Id.* at 28-29.

The government is attempting to pass off Defendant's ambiguous reaction as an admission or confession of some sort. Such evidence of guilt or liability is considered to be so damning that courts are loath to admit the evidence unless it is extremely clear that the party intended to convey the meaning being asserted by the opposition, and that it was reliable. *See Stubblefield v. Suzuki Motor Corp. of Am.*, No.: 3:15-CV-18-HTW-LRA, 2018 U.S. Dist. LEXIS 168642, at \*10 (S.D.

Miss. Sep. 29, 2018) (finding that testimony that the plaintiff had made hand gestures while semi-conscious in the hospital after a wreck which were claimed to be mimicking attempts to apply front hand-brakes was unfairly prejudicial under Fed. R. Ev. 403 because the jury would be likely to find the defendant liable “without benefit of the remainder of the evidence”), *aff’d*, 826 F. App’x, 309 (5th Cir. 2020).

While courts sometimes allow evidence of a defendant’s actions both before and after an alleged crime, the party offering that evidence “shall not attribute wrongful motivation or guilt to such action.” *See Prescott v. R&L Carriers, Inc.*, No. 3:11-203, 2013 U.S. Dist. LEXIS 5706, at \*13 (W.D. Pa. Jan 15, 2013). The *Prescott* court found that a defendant’s act of leaving a scene of an alleged wrong could not be characterized as a display of guilt or liability. The court said that “[s]uch a characterization of Mead’s actions would be unfairly prejudicial, substantially outweighing any probative value.” *Id.* at 13. Though the government here is not directly characterizing Defendant’s actions as an admission of guilt, the only relevant purpose for presenting testimony of Defendant’s ambiguous conduct is to imply proof of his guilt. This makes the evidence itself a characterization of his emotional response. Such evidence has no probative value that is not outweighed by the enormous impact that an alleged admission of guilt that a police officer observed would have upon a jury.

**C. Allowing the officer’s inadmissible testimony would unfairly prejudice Defendant’s presentation of his case beyond the harm of misleading the jury with speculation.**

In *Arizona v. Fulminate*, 499 U.S. 279 (1991), the Supreme Court found that the prejudicial effect of evidence goes beyond the jury’s consideration of the evidence itself when its admission can cause a party to unfavorably change the presentation of their case in response to it. *Id.* at 39-40. The *Fulminate* court ruled on the application of harmless error to the admission of a coerced

confession. *Id.* In finding that the admission of the confession was not harmless, the court noted that the dangers of a defendant's alleged admissions of guilt are not limited to the weight and relevance that a jury is likely to give them. *See id.* at 39-40. The Supreme Court noted the impact that admission of such testimony had on the case as a whole, and the court especially observed that one of the prejudicial effects of admitting the testimony was that it led "to the admission of other evidence prejudicial to [the defendant]." *See id.* at 39. The *Fulminate* court noted that, "had the confession not been admitted, there would have been no reason for Sarivola [a witness for the defendant] to testify." *See id.* at 40. Allowing the government's evidence forced the defendant to bring a witness to testify against it. Putting the witness on the stand allowed the government to present evidence that the witness had ties to organized crime. *See id.* at 39. The court found that, "[a]bsent the confession, this evidence would have had no relevance and would have been inadmissible at trial." *Id.* The government argued that the evidence reflected upon the character of the witness and not the defendant, but the court refuted that and found that it "cannot agree that the evidence did not reflect on [the defendant's] character as well, for it depicted him as someone who willingly sought out the company of criminals." *See id.* at 40. The court held that "[i]t is quite possible that this evidence led the jury to view [the defendant] as capable of murder." *Id.*

Virginia courts have also noted the dangers of allowing inadmissible testimony that could force the defendant to give up his right not to testify. *See, e.g., Taylor v. Commonwealth*, 26 Va. App. 485, 19-20 (1998) ("To allow the Commonwealth to prove that the appellant admitted his guilt by remaining silent in response to police questions effectively burdened the appellant's trial

right not to testify because of the adverse inference that would be drawn from his failure to respond to the prosecution's evidence of his silence.")

In this case, Defendant would likely have to take the stand to convince the jury that his emotional reaction was not an admission of guilt. Difficult decisions must be made in the effort for a just outcome, and defendants must often decide whether to take the stand in order to mitigate damaging evidence. However, just as it was for Fulminante's witness, "there would have been no reason" for our defendant to testify if the inadmissible testimony is not allowed. *See Arizona v. Fulminate*, 499 U.S. 279, 40 (1991). If forced to take the stand to explain this inadmissible testimony, Defendant could potentially face even further unforeseen prejudice. This could also create a worse situation than the one the *Fulminate* court noted as contributing to unfair prejudice since Defendant himself would be forced to testify. The prejudice he could experience throughout the trial from the admission of inadmissible testimony may have an exponential impact, far beyond the already unfair prejudice it creates on its own.

**D. Admitting the testimony of Defendant's silent reaction would use his silence against him and would violate the Fifth Amendment.**

Admitting this testimony would negatively affect the defendant's right to silence. A characterization of the defendant's silence in the presence of an officer amounts to a violation of the defendant's constitutional protections against self-incrimination. In *United States v. Velarde-Gomez*, the Ninth Circuit held that, "[w]hether the government argues that a defendant remained silent or describes the defendant's state of silence, the practical effect is the same -- the defendant's right to remain silent is used against him at trial. To hold otherwise would circumvent the constitutional protection against self-incrimination." 269 F.3d 1023, 20-21 (9th Cir. 2001). *See also United States v. Whitehead*, 200 F.3d 634, (9th Cir. 2000) (ruling that the government may

not comment on post-arrest silence because such comments would constitute a penalty on the right to remain silent).

While these and many other cases generally involve silence that was observed after an individual was taken into custody, in *Taylor v. Commonwealth*, 26 Va. App. 485 (1998), the court of appeals determined that the use of pre-custodial silence could have the same effect:

The issue here is whether the Fifth Amendment affords any protection to an individual who is not compelled to testify or speak from having the person's exercise of his fundamental right to remain silent from being used in a judicial proceeding as an admission of guilt. In other words, do the constitutional privileges against self-incrimination protect a defendant's *pre-custodial silence* in response to police questioning from being introduced as *substantive evidence* of guilt in the government's case-in-chief.

*Taylor v. Commonwealth*, 26 Va. App. 485, 6 (1998).

The *Taylor* court concluded that testimony of pre-custodial silence should be barred for much the same reasons as the use of custodial silence is prohibited:

[T]o permit the Commonwealth to prove that the appellant tacitly admitted his guilt by remaining silent is tantamount to allowing the Commonwealth to derive an involuntary admission of guilt from the appellant. To accord a suspect less protection where he exercises the basic and fundamental right to not speak in response to non-custodial questions, when the constitutions protect the right to remain silent in a custodial situation, would be illogical. By allowing the jury to decide that the appellant's silence was an admission of guilt, the Commonwealth, in effect, "compelled" him to provide incriminating testimony at trial. When the appellant remained silent and did not speak to Deputy Inge or testify at trial, the Commonwealth was allowed to prove that he nonetheless admitted ownership of the handgun. We can think of few other techniques that would bring to bear this degree of direct compulsion on a criminal defendant to "speak his guilt" before the jury.

*See Taylor*, 26 Va. App. at 20 (internal citations and quotations omitted).

The speculative nature of the evidence in this case would allow “the jury to decide that the appellant’s silence was an admission of guilt.” *See id.* This amounts to compelling the defendant to provide incriminating testimony at trial. For this independent reason, the Court should bar the testimony.

### **CONCLUSION**

Testimony regarding Defendant’s head nod is so ambiguous that it demands speculation by the jury in order to assign it meaning. The only relevant purpose of this evidence is to lead the jury to an inference of Defendant’s guilt. For the reasons cited above, such evidence would mislead the jury, would cause significant unfair prejudice to the defendant, and has no probative value. Furthermore, the admission of this evidence would violate the defendant’s Fifth Amendment rights, just as in *Taylor v. Commonwealth*. For these reasons, the defendant respectfully requests that this Court grant the motion and exclude the evidence pursuant to Virginia Rule of Evidence 2.403 as well as the Fifth Amendment to the United States Constitution.

Respectfully submitted

/s/ Jonathan W.E. Thomas  
COUNSEL FOR DEFENDANT

## Applicant Details

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**Country**  
**United States**

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## Applicant Education

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 Date of BA/BS **May 2021**  
 JD/LLB From **Hofstra University School of Law**  
<http://law.hofstra.edu/home/index.html>  
 Date of JD/LLB **May 20, 2024**  
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 Law Review/Journal **Yes**  
 Journal(s) **Hofstra Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **Hofstra Moot Court Board**  
**Hofstra Moot Court Interscholastic Team**

## Bar Admission

## Prior Judicial Experience



Judicial Internships/ Externships	<b>Yes</b>
Post-graduate Judicial Law Clerk	<b>No</b>

### **Specialized Work Experience**

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

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The Honorable Jamar K. Walker  
United States District Court for the Eastern District of Virginia  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my sincere interest in a judicial clerkship position in your chambers. As a rising third-year student at the Maurice A. Deane School of Law at Hofstra University, graduating in May 2024, I am eager to apply my legal writing, research, and analytical skills in service of the federal judiciary. I present herein my academic record, practical legal experience, and demonstrated ability to excel in challenging roles in hopes of encouraging your consideration of my candidacy.

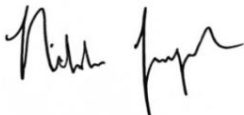
I rank in the top 1.8% of my law class with a 3.87 GPA and serve as an Articles Editor for the *Hofstra Law Review*. Additionally, I have earned CALI Excellence for the Future Awards for achieving the highest scores in Torts, Property, Business Organizations, Health Law, and Biotechnology: Law, Regulation, and Ethics. This spring, I won an interscholastic moot court competition: the ABA National Appellate Advocacy Competition, Brooklyn Regional. I am a skilled legal writer and oral advocate and would be honored to apply these skills to the critical work of your chambers as a clerk.

My legal experience has proven particularly formative. I have honed my legal research and writing skills as a judicial intern to the Honorable James Wicks and the Honorable Joanna Seybert, both of the Eastern District of New York, and as a Research and Teacher's Assistant to Professors Jennifer Gundlach, Daniel Greenwood, and Ashira Ostrow. This summer, I will continue to enhance my skill set and deepen my knowledge of the practice of law as a Summer Associate in the Litigation Group at Paul, Weiss, Rifkind, Wharton & Garrison LLP. I look forward to viewing the litigation process from a firm perspective and sharpening my practical skills.

Beyond the classroom, my tenure as President of the Business Law Society and TAMID Consulting at Syracuse University, as well as my work with Tel Aviv-based startups, reflect my leadership and problem-solving capabilities. I am convinced that the combination of my academic record and practical legal experience will allow me to contribute positively to your chambers.

Since my first exposure to the federal court system last summer, I possess complete confidence that I seek to embark on my legal career supporting the federal bench as clerk, and each decision I have made during law school has been with that goal in mind. It would be an honor to do so under your mentorship. Thank you for considering my application. I would welcome the opportunity to further discuss my qualifications with you.

Respectfully,



Nicholas Tramosch

## Nicholas E. Tramposch

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### EDUCATION

**Maurice A. Deane School of Law at Hofstra University**, Hempstead, NY

Juris Doctor Candidate, May 2024

GPA: 3.87; Rank: 5 of 281 (Top 1.8%)

Honors: *Hofstra Law Review*, Articles Editor, Vol. 52; Dean's List (4 semesters); CALI Excellence for the Future Award (highest scoring student) in Torts, Property, and Business Organizations, Health Law, and Biotechnology: Law, Ethics, and Regulation; Champion, ABA National Appellate Advocacy Competition, Brooklyn Regional

Activities: *Pro Se* Legal Assistance Clinic (anticipated Fall 2023); President, Business Law Society; Vice President, Hofstra Dispute Resolution Society; Moot Court Board

**Syracuse University**, Syracuse, NY

Bachelor of Science in Biotechnology, Bachelor of Science in Finance, *magna cum laude*, May 2021

GPA: 3.73

Honors: Coronat Full Tuition Academic Scholarship (top 15 admitted students); Dean's List (8 semesters); Special Achievement in Biotechnology Award

Activities: Biotechnology Sector Specialist, Investment Club; Molecular Biotechnology Researcher

### LEGAL EXPERIENCE

**Paul, Weiss, Rifkind, Wharton & Garrison LLP**, New York, NY

*Summer Associate, Litigation*, May 2023 – Present

Draft legal memoranda, attend discovery conferences, and participate in strategy meetings for matters.

**Maurice A. Deane School of Law at Hofstra University**, Hempstead, NY

*Research Assistant and Teacher's Assistant*, January 2022 – Present

Research metacognitive learning strategies and regulation pertaining to Civil Procedure and bar passage rates for Professor Jennifer Gundlach. Draft manual to be included in Cases and Materials for Land Use, 8<sup>th</sup> Edition for Professor Ashira Ostrow. Teach tort law review sessions to first-year students for Professor Greenwood.

**United States District Court for the Eastern District of New York**, Central Islip, NY

*Judicial Intern to the Honorable James Wicks*, September 2022 – December 2022

Drafted summary judgment orders, reports, and recommendations. Wrote bench memoranda for status conferences, preliminary conferences, and oral arguments. Attended various court and trial proceedings.

**United States District Court for the Eastern District of New York**, Central Islip, NY

*Judicial Intern to the Honorable Joanna Seybert*, June 2022 – August 2022

Researched and analyzed claims. Drafted bench memoranda and analysis in preparation for motions. Reviewed briefs and motions. Drafted summary judgment orders.

**Andruzzi Law Esq.**, Bethpage, NY

*Paralegal*, June 2021 – September 2021

Drafted discovery requests and responses, motions to compel, summonses, affidavits, and complaints. Conducted legal research, composed legal memoranda, and engaged clients to address concerns and provide case updates.

### OTHER EXPERIENCE

**TAMID Consulting at Syracuse University**, Syracuse, NY

*President*, November 2018 – January 2021

Oversaw 12 consulting projects with Tel Aviv-based startups. Created 10 stock pitches on Israeli cloud computing, artificial intelligence, and technology firms for the TAMID national portfolio.

**Neuro-Biomorphic Engineering Lab**, Tel Aviv, Israel

*Business Development Consultant*, May 2020 – August 2020


Conducted due diligence market and patent research for a novel rehabilitative robotic arm.

### INTERESTS

Skiing; volunteering and service; professional wedding photography; classical violin; former Eagle Scout


SUBJ NO.		COURSE TITLE	CRED GRD	PTS R
<b>INSTITUTION CREDIT:</b>				
Fall Semester 2021				
Rank: 10 of 284				
Honors & Awards: Dean's List				
Honors & Awards: CALI Award				
Torts (B2)				
LAW 1600	INTRODUCTION TO LAW	1.00 P	0.00	
LAW 1700	CIVIL PROCEDURE	5.00 A	20.00	
LAW 1710	CRIMINAL LAW	3.00 A-	11.01	
LAW 1720	LEG. ANALYSIS WRTG. & RES. I	3.00 A-	11.01	
LAW 1735	TORTS	4.00 A+	16.00	
Ehrs: 16.00 GPA-Hrs: 15.00 QPts: 58.02 GPA: 3.86				
Spring Semester 2022				
***** CONTINUED ON NEXT COLUMN *****				
<b>Comments Continued:</b>				
Rank: 11 of 280				
Honors & Awards: Dean's List				
Honors & Awards: CALI Award				
Property (B)				
LAW 1705	CONTRACTS	5.00 A-	18.35	
LAW 1730	PROPERTY	4.00 A	16.00	
LAW 2783	LEG. ANALYSIS WRTG. & RES. II	2.00 A	8.00	
LAW 3760	CONSTITUTIONAL LAW I	3.00 A-	11.01	
Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 53.36 GPA: 3.81				
Summer Session I 2022				
LAW 3821	SUMMER EXTERNSHIP	3.00 P	0.00	
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
Fall Semester 2022				
Rank: 7 of 273				
Honors & Awards: Dean's List				
Honors & Awards: CALI Award Business Organizations (A)				
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**Brian T. Kaspar**  
Associate Dean for Academic Records & Registrar-Law


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Student No: 702282192					Date Issued: 09-JUN-2023				
Record of: Nicholas Tramosch					Page: 2				
<b>MAURICE A. DEANE SCHOOL OF LAW</b> 121 Hofstra University Hempstead, New York 11549-1210									
SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R	SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R
Institution Information continued:					Fall Semester 2023				
LAW	2520	EXTERNSHIP SEMINAR, JUDICIAL	1.00 A	4.00	IN PROGRESS WORK				
LAW	2758	ADVANCED COMPETITION SKILLS	1.00 P	0.00	LAW	2741	LGL SKILLS UNDR REP FED LITIGNT	2.00	IN PROGRESS
LAW	2861	HOFSTRA LAW REVIEW	2.00 P	0.00	LAW	2742	PRO SE LGL ASST PRG FLD PLCMNT	2.00	IN PROGRESS
LAW	3200	FOUNDATIONAL LAWYERING SKILLS	3.00 A-	11.01	LAW	3734	LGL & BIOETH RSP HLTHCRE CHLNG	3.00	IN PROGRESS
LAW	3761	CONSTITUTIONAL LAW II	3.00 A	12.00	LAW	3794	BANKRUPTCY	3.00	IN PROGRESS
LAW	3828	EXTERNSHIP, JUDICIAL	2.00 P	0.00	LAW	4751	CRIMINAL PROCEDURE I	4.00	IN PROGRESS
LAW	4701	BUSINESS ORGANIZATIONS	4.00 A+	16.00	In Progress Credits 14.00				
Ehrs: 16.00 GPA-Hrs: 11.00 QPts: 43.01 GPA: 3.91					***** TRANSCRIPT TOTALS *****				
Spring Semester 2023					Earned Hrs GPA Hrs Points GPA				
Rank: 5 of 281					TOTAL INSTITUTION 64.00 52.00 201.73 3.87				
LAW	2758	ADVANCED COMPETITION SKILLS	1.00 P	0.00	TOTAL TRANSFER 0.00 0.00 0.00 0.00				
LAW	2861	HOFSTRA LAW REVIEW	2.00 P	0.00	OVERALL 64.00 52.00 201.73 3.87				
LAW	2921	PATENT LAW	2.00 A-	7.34	***** END OF TRANSCRIPT *****				
LAW	3733	BIOTECH: LAW, REGLTN & ETHICS	3.00 A+	12.00					
LAW	3844	HEALTH LAW	3.00 A+	12.00					
LAW	4761	EVIDENCE	4.00 A	16.00					
Ehrs: 15.00 GPA-Hrs: 12.00 QPts: 47.34 GPA: 3.94									
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**Brian T. Kaspar**  
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# SYRACUSE UNIVERSITY

## Office of the Registrar

### Academic Transcript

Tramosch, Nicholas E		75222-7584	Transcript Print Date: 01/18/2022								
Undergraduate Record											
Dual The College of Arts and Sciences and Whitman School of Management											
Major: Biotechnology											
Major: Finance											
Degree Awarded: Bachelor of Science Award Date: 05/23/2021 Honors: Magna Cum Laude											
<b>OTHER CREDIT</b>											
AP	Biology	4.000									
AP	Chemistry	5.000									
AP	Mathematics - Calculus BC	8.000									
AP	Physics C (Electr & Magnetism)	4.000									
AP	Physics C (Mechanics)	4.000									
AP	Spanish Language	4.000									
<b>MILESTONES</b>											
Whitman Internship		Completed	10/11/2019								
Whitman Community Engagement		Completed	05/21/2021								
<table border="0"> <tr> <td> <b>Fall 2017-Dual Arts &amp; Sci/Management</b>            Cell Biology BIO327 3.0 A            Environment and Society GEO103 3.0 B+            Honors Orientation Seminar HNR100 1.0 A            Foundatns Human Behavior PSY205 3.0 A            Perspectives of Business/Mgmt SOM122 3.0 A            Academic Writing (Honors) (HNR) WRT109 3.0 B+            Attempted: 16.0 Earned: 16.0 GrPts: 59.9980 GPA: 3.750         </td> <td> <b>Fall 2019-Dual Arts &amp; Sci/Management</b>            Biomaterials &amp; Medical Devices BEN468 3.0 A            Research in Biology BIO460 2.0 B            Molecular Biotechnology BIO463 4.0 B+            Principles of Finance FIN256 3.0 A            Structures and Innovation HNR360 3.0 A            Principles of Marketing MAR255 3.0 A-            Intro to SCM SCM265 3.0 B+            Attempted: 21.0 Earned: 21.0 GrPts: 76.3320 GPA: 3.635         </td> </tr> <tr> <td> <b>Spring 2018-Dual Arts &amp; Sci/Management</b>            Genetics BIO326 3.0 A-            General Chemistry Lecture II CHE116 3.0 A            Economic Ideas &amp; Issues ECN203 3.0 A            Folk Arts &amp; Oral Trad of India HNR360 3.0 A            Intro to the Legal System LPP255 3.0 A-            Intro. 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Continued on next column		<b>** Undergraduate Record Credit Summary **</b> Total Units Earned: 168.000 GPA Credits: 135.0 Transfer Credit: 0.000 Grade Points: 503.3370 Other Credit: 29.000 Cumulative GPA: 3.728 End of Undergraduate Record End of complete transcript record									
The Official transcript paper version is printed on security paper. The Official e-Transcript is delivered as a secured PDF document that certifies the authenticity. The University Registrar's signature and Syracuse University seal appear on the right. The Official transcript may not be released without the written consent of the student.		  University Registrar									



**SYRACUSE UNIVERSITY, Transcript Office, 109 Steele Hall, Syracuse, New York 13244-1120 (315) 443-2422**

**OFFICIAL TRANSCRIPTS:** Transcripts are prepared by the Registrar's Office in accordance with policies of the American Association of Collegiate Registrars and Admissions Officers. Transcripts show only those credits earned at Syracuse University and those credits transferred from other institutions that are applied to the Syracuse degree program. Official transcripts are imprinted with the seal of the University and the signature of the University Registrar. A raised seal is not required. Without the seal and signature, this document is not an official transcript.

**GRADE REPORTS:** Grade reports show only courses and grades for a specific semester. Grade reports may also be used as supplements to transcripts which were previously requested by the student. Official grade reports also are imprinted with the seal of the University and the signature of the University Registrar.

**3<sup>rd</sup> PARTY RELEASE OF A TRANSCRIPT OR GRADE REPORT:** This transcript or grade report has been forwarded to you with the understanding that it will not be released to other parties. The federal Family Educational Rights and Privacy Act of 1974 prohibits release of this information without the student's written consent. Please return the transcript to Syracuse University if you are unable to comply with this condition.

**DEGREES AND HONORS:** Degree completion is signified on the transcript by an award date printed next to the degree name. **UNDERGRADUATE PROGRAM HONORS**, designated by the notation "HON" printed after the major, indicates that the student was part of the Honors Program and received honors in that field. **UNDERGRADUATE DEPARTMENTAL DISTINCTION**, designated by the notation "DPT" printed after the major, indicates that the student received distinction in that field. **UNDERGRADUATE UNIVERSITY HONORS** are awarded upon degree certification to students earning a superior cumulative GPA: Cum Laude, GPA 3.2 to 3.49 (Architecture), 3.4 to 3.59 (all other); Magna Cum Laude, GPA 3.5 to 3.79 (Architecture), 3.6 to 3.79 (all other); Summa Cum Laude GPA 3.8 to 4.0 (all schools). These designations appear next to the degree award date.

**COURSE NUMBERING SYSTEM:** Effective September 1968: **001-099:** When the semester heading reads "Semester Abroad", these are credit-bearing courses taken through the Syracuse University Abroad program. Under all other semester headings, these are remedial and non-credit courses; **100-199:** freshman level; **200-299:** sophomore level; **300-499:** junior and senior level; **500-599:** joint undergraduate and graduate; **600-699:** first-year graduate level; **700-899:** second and third-year graduate level; **900-996:** readings, research, and individual study courses at the doctoral level only; **997:** master's thesis; **998:** individual study at the graduate level; **999:** doctoral dissertation. Prior to September 1968, the course numbering system was **000-099:** lower division undergraduate; **100-199:** upper division undergraduate; **200-299:** joint undergraduate and graduate; **300-399:** graduate.

**CREDIT:** A unit of credit is represented by the semester hour, which stands for one class period of fifty (50) minutes in length for fifteen (15) weeks or the equivalent.

**GRADE POINT AVERAGE:** The grade point average (GPA) is calculated by dividing the number of grade points earned by the number of credits attempted.

GRADE	GRADE POINTS PER CREDIT
A	4.0
A-	3.6666
B+	3.3333
B	3.0
B-	2.6666
C+	2.3333
C	2.0
C-	1.6666
D (Undergraduate & Law only)	1.0
D- (Law only)	.6666
F	0

OTHER GRADING SYMBOLS	MEANING	GRADE POINTS PER CREDIT
AU	Audit	Not counted
H	Honors (Law only)	Not counted
HH	High Honors (Law only)	Not counted
I	Incomplete	0
I+default grade	Incomplete with default grade	As default grade
NA	Did not attend	Not counted
NG	No Grade	Not counted
NR	Not required	Not counted
P, P*	Passing	Not counted
RM	Remedial	Not counted
V	Variable length course – grade not yet due	Not counted
WD	Withdrew	Not counted

Prior to January 1981, NA's counted as F's. Prior to August 2017 NA indicated Did not attend/withdraw. Obsolete symbols that may appear on older transcripts include **NC** (no credit, not counted for GPA); **S** (satisfactory, not counted); **U** (unsatisfactory, 0 points); **WF** (withdrew failing, 0 points); and **WP** (withdrew passing, not counted). As of September 1987, the grading system was expanded to include plus (+) and minus (-) grades as shown above for all non-Law courses. P\* is used to indicate exceptional circumstances, allowed only in specific academic terms identified by the University, and counts as a Pass (P).

SPECIAL CODES	DESCRIPTION
(ar)	Course credit is not included in Units Earned or GPA Credits and grade points are not included in GPA calculation, in accordance with Academic Renewal policy.
(g)	This is a graduate level course taken by an undergraduate who has not been admitted to a graduate program at SU. It is not used to fulfill undergraduate degree requirements. The course credits count towards units earned, GPA credits, and the grade points are included in the GPA calculation.
(gn)	This is a graduate level course taken by an undergraduate admitted to a graduate program at SU. It is not used to fulfill undergraduate degree requirements and the credits may be transferred into the graduate record. On the undergraduate record, course credit is not included in Units Earned or GPA credits and grade points are not included in GPA calculations.
(n)	Course credit is not included in Units Earned or GPA Credits and grade points are not included in GPA calculations.
(r)	This is a retaken course and the credits and grade points are included in all calculations.
(un)	This is an undergraduate course taken by a graduate student. It does not count towards a graduate degree.
(HNR)	This is an Honors section of the course.
(X)	The F grade on this class is the result of a violation of the Academic Integrity Policy.

**ENGINEERING AND COMPUTER SCIENCE COOPERATIVE EDUCATION PROGRAM** consists of work experience in several segments, represented on the transcript as ECS 370/470/570, Professional Practice. A minimum of two work segments satisfy program requirements.

**COLLEGE OF LAW:** Prior to September 1999, Law courses could be given plus (+) grades. A grade of 'B+' earned 3.5 grade points per credit and a 'C+' earned 2.5 grade points per credit. As of September 1999 Law courses follow the plus/minus (+/-) grade system shown above. As of fall 2011, Law grading system expanded to include D-.

College of Law students are ranked each semester and the class rank is displayed below the semester statistics. College of Law also places students with an appropriately high semester GPA on the Dean's List. This designation is displayed below the statistics for the semester.

**COLLEGE OF LAW HONORS:** Summa Cum Laude, GPA 3.55 and above; Magna Cum Laude, GPA 3.35 to 3.54; Cum Laude, GPA 3.00 to 3.34. The requisite minimum honors grade point average may have been increased in any year to assure that not more than 2% of any graduating class graduated summa cum laude, not more than 10% of any graduating class graduated either summa cum laude or magna cum laude, and not more than 25% of any graduating class graduated with honors. In calculating graduation honors, grade point averages at the College of Law are rounded to the nearest hundredth.

[REGTRNLEG 09082021]



Daniel J.H. Greenwood  
*Professor of Law*

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108 Law School  
121 Hofstra University cell: 801-755-7607  
Hempstead, NY 11549 Daniel.Greenwood@hofstra.edu

June 6, 2023

Dear Judge:

I write to recommend Nicholas Tramposch for a position as your law clerk.

Mr. Tramposch was a student in my Torts and Business Organizations classes, as well as my teaching assistant in Torts and research assistant. In each of the positions, he excelled.

I teach both Torts and Business Organizations at a high conceptual level – we focus not only on the black letter doctrine and rules, but on the justice, economic, planning and regulatory issues that underlie them, including active controversies and ongoing debates as much as settled law. Successful students come away with an understanding of not only the rules themselves and the policies underlying them but how economic actors can respond to legal rules and how regulators can respond to those responses.

Mr. Tramposch is among the very best students I have had the privilege of teaching at Hofstra.

In Torts, his A+ was earned by the highest score in the class on the exam. Similarly, Mr. Tramposch was highly engaged in class, often bringing his undergraduate training and common sense to add sophistication to his legal analysis and repeatedly pushing the discussion to deeper levels.

As a result of his performance, I invited Mr. Tramposch to be my course assistant the following year. In that role, he took the initiative to organize a series of discussion sessions for students, centered around a close analysis of a multiple-choice question illustrating a particular torts issue. In addition, he produced almost 50 multiple choice questions with accompanying explanations for students to use as practice and to consolidate their understanding of the course. As I edited those questions, I was impressed by the facility with which he identified core doctrinal issues and his pursuit of the relevant issues beyond the surface to examine their broader implications for the law and social regulation of behavior.

Mr. Tramposch's performance in Business Organizations was equally impressive. Again, I found that I could count on him to explain difficult points when his classmates were





struggling, and again his exam reflected his careful work and deep understanding. I hope that he will assist me again next year in this course as he did last year in torts.

Additionally, Mr. Tramposch suggested working together on an article concerning the Supreme Court's recent changes to religious rights of free exercise and disestablishment. He drafted several sections of this paper and we are currently working together to rewrite and consolidate it.

In each of these contexts, Mr. Tramposch has demonstrated a level of initiative and acumen rarely see; he gets more done on more projects than any student I've worked with for years. Similarly, he has consistently impressed me as well-spoken, organized and prepared. His writing is fundamentally clear, thoughtful and well-organized, if sometimes adjectively overrun. Already quite good, it will rapidly improve with even minimal editing.

Based on my own experience clerking in the SDNY and my opportunities to work with Mr. Tramposch, I expect that the initiative, hard work and ambition he has demonstrated so far will enable him to serve you well as a clerk and then lead him on to a distinguished career as a fine lawyer. I recommend him without qualification for your position.

If I can be of any further help, please call or email.

Sincerely,

A handwritten signature in blue ink that reads "Daniel JH Greenwood". The signature is written in a cursive, flowing style.

Daniel JH Greenwood



Jennifer A. Gundlach  
*Emily and Stephen Mendel Distinguished Professor of Law  
 and Clinical Professor of Law*

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Room 228, Law School      tel: 516-463-4190  
 121 Hofstra University      Jennifer.Gundlach@hofstra.edu  
 Hempstead, NY 11549

May 30, 2023

**RE: Clerkship Application of Nicholas Tramposch**

Dear Judge:

It gives me great pleasure to recommend Mr. Nicholas Tramposch in connection with his application for a post-graduate clerkship with you. I have taught and worked closely with him over the past two years and I can say without a doubt that he stands at the top of my list as one of the most exceptional students I have had in my 23 years of teaching. He is a truly superior candidate who would make an invaluable addition to your chambers.

Nick possesses the ideal blend of strong oral and written analytic skills, with the poise and professionalism required for a law clerk. It was my good fortune to have him as a student in Civil Procedure during his first year at the Maurice A. Deane School of Law at Hofstra University. He exhibited incredible intellectual curiosity and complex analytical thinking every time I cold-called him, as well as when he volunteered during class discussions. It came as no surprise to me when he earned one of the highest A's in my class (of which there are very few), nor that he has since earned top grades in all of his other courses as well.

I was so impressed with Nick's work ethic and the role that he played in helping his peers during my class that I asked him to serve as my Teaching Fellow, as well as my Research Assistant, the following year. In that role, he earned the respect and appreciation of the next year's Civil Procedure students as he led review sessions and created hypothetical fact patterns for students to apply what they were learning. He was also invaluable to me in my empirical research study, spending hours reviewing data and discussing them with me and my colleague. In addition, he worked meticulously to edit an article of mine for publication. That same discipline and attention to detail are what elevated him to Articles Editor of the *Hofstra Law Review* in the coming year, as he continues to adeptly juggle the responsibilities of serving on our Moot Court Board and engaging in interscholastic moot court competitions.

Nick has had remarkable exposure to federal practice during the past two years and has shown great interest in immersing himself in the community of federal practitioners. I was so impressed with him that I recommended him to the senior judge sitting in the Eastern District of New York's Central Islip courthouse, the Honorable Joanna Seybert for a judicial internship during the summer after his first year. I heard from her clerks and Judge Seybert that he was very impressive, and he found the experience so valuable that he then applied for and was accepted

Page 2  
May 30, 2023

for a second judicial internship with Magistrate Judge James Wicks. And this coming fall, I look forward to having him as a student again, this time in the Hofstra Law Pro Se Legal Assistance program, a hybrid clinic in which I supervise students in providing limited scope legal assistance to self-represented litigants in EDNY civil cases. Through that position, he will have a new opportunity to see federal practice and procedure from the litigant's vantage point. I would also add that Nick regularly attends events hosted by our regional EDNY Chapter of the Federal Bar Association (for which I serve as a faculty advisor) and is always in the audience when there is something to be learned from a visiting judge or distinguished practitioner at the Law School.

Refreshingly, the depth and breadth of Nick's involvement stems from his thirst for learning and immersing himself in different areas of practice. In a sense, he is cultivating his own interdisciplinary legal education by casting a wide network and soaking up all that he can about the legal profession and the practice of law. Nick's superior performance in classes, extracurricular activities, and professional experience during law school are clear evidence of his discipline and deep engagement with the law, qualities that are essential for a trusted law clerk. Just as importantly, Nick is the kind of person who comes along once in a generation of students and who I undoubtedly will remain close to for years to come. He is mature, unassuming, compassionate, funny, and authentic – a true joy to be around. In short, I give him my highest recommendation for a clerkship position.

Warmly,

*Jennifer A. Gundlach*

Jennifer A. Gundlach



## LAW FACULTY

121 Hofstra University  
Hempstead, NY 11549

[law.hofstra.edu](http://law.hofstra.edu)

June 2, 2023

Dear Judge:

I write in support of Nicholas Tramposch's application for a clerkship in your chambers. I am a Special Professor of Law at Maurice A. Deane School of Law. I have known Nick since the fall of 2022, when he contacted me about taking my Biotechnology: Law, Regulation and Ethics Seminar. We spoke online and I was immediately impressed with his intelligence and enthusiasm. He was extremely knowledgeable about biotechnology as it relates to law and I could tell that he would add a great deal to our class discussions.

Nick's presence and participation in the seminar were beyond my expectations. He is an extremely considerate person and was outstanding in the quality of his contributions to the class and in his support of his classmates, especially during group assignments. I could always count on him to help out if necessary. He has a great sense of humor and at the same time, a maturity unexpected of students who have not yet embarked on their professional careers. I mention Nick's excellent character because as intelligent as he is, he does not hold himself above others and is humble and empathic.

Although I have only known Nick for one semester, he impressed me as among the top students I have taught during my career. His knowledge of the law is impressive—often in class he would contribute by citing statutes and case law related to the topic of discussion. These contributions were extremely helpful to the class, and I was impressed by his knowledge, detailed retention, and his application of the law. He is as well-versed as any student I have known in many areas of the law. His recall is outstanding but it is anything but rote—he takes legal information and applies it to problems appropriately, inventively, and creatively. I believe that as Nick develops as a scholar and as a professional he will enrich the field of law with his ideas.

Throughout the semester, we had ongoing discussions about his interest in Law and Economics. Much of our class was devoted to the application of bioethics to developments in biotechnology, as well as how the law developed in response to new technology. As the semester went on, we met on several occasions to discuss law and economics and its application to new and developing biotechnology. In our discussions, he evidenced his excellent reasoning ability and combined his theoretical skills to develop a thesis about this application. The result was an exceptionally well-written term paper where he developed his thesis evidencing not only his comprehension of difficult scientific material but his ability to take his thesis and construct viable and interesting legal arguments. I found that our discussions always brought up new and interesting questions. While always respectful, Nick often challenged assertions, arguing various ways of approaching legal issues.

Nick is extremely hardworking, energetic, generous, and creative. He enjoys being challenged intellectually and looks for opportunities to add to his knowledge of the law. I expect that he will excel in his career, and I look forward to watching him flourish. Because of all of his personal qualities, his

Page 2  
June 2, 2023

intelligence, and his enthusiasm, I believe he would be an excellent clerk and offer outstanding research and writing support to your chambers. As a result of his abilities, character, and promise, I unequivocally support his application.

Please let me know if you need any additional information.

Sincerely,

A handwritten signature in black ink that reads "Tracy Dunbrook". The signature is written in a cursive, flowing style.

Tracy Dunbrook  
Special Professor of Law  
Maurice A. Deane School of Law  
Hofstra University  
[tracy.a.dunbrook@hofstra.edu](mailto:tracy.a.dunbrook@hofstra.edu)  
917-865-1212

**Nicholas E. Tramposch**

77 Ellensue Drive, Deer Park, NY 11729 | ntramposch1@pride.hofstra.edu | (631) 681-0959

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The enclosed writing sample is an appellate brief concerning the First Amendment rights and academic freedom of a public university professor, which I prepared in anticipation of the American Bar Association's National Appellate Advocacy Competition, Brooklyn Regional. At the competition, our team argued on behalf of both sides throughout five rounds of competition. Although our team competed together, I was responsible for briefing and arguing our second issue: this writing sample is entirely my own work product. I have omitted the table of contents, the table of authorities, the jurisdictional statement, and portions of the other sections for brevity. I would be happy to provide the full brief upon request.

No. 01–463

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**In the Supreme Court of the United States**

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JONAH SMITH,

*Petitioner,*

v.

ALBERT HALL, SHELIA BARRETT, AND WESTLAND  
COMMUNITY COLLEGE.

*Respondents.*

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**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRTEENTH CIRCUIT**

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**BRIEF FOR THE PETITIONER  
JONAH SMITH**

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NICHOLAS TRAMPOSCH  
77 Ellensue Drive  
Deer Park, NY 11729

Counsel for the Petitioner

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### ISSUE PRESENTED

Whether the First Amendment’s prohibition against compelled speech limits a public college’s power to require an experienced professor to endorse a viewpoint that conflicts with the instructor’s academic views.

### STATEMENT OF THE CASE

This Court has long recognized that the First Amendment prohibits the government from compelling its citizens to speak—or remain silent. *E.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943). College classrooms are unique in offering a forum for the marketplace of ideas to flourish. At a time when education plays an increasing role in employment opportunities, “academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian v. Board of Regents*, 385 U.S. 589, 608 (1967).

This case concerns such a pall of orthodoxy arising from the disciplined attempt of a floundering public community college to conscript its faculty into making written and verbal oaths during classroom instruction. In the spring of 2019, Petitioner Jonah Smith faced a choice: he could either parrot his public employer’s institutional ideals, suppressing his personal academic beliefs, or risk losing his job and his opportunity for tenure. (Record (“R.”), at 10–11.)

In 2019, to address the school’s ongoing student recruitment and retention issues, the Westland Community College (“WCC”) administration began to develop the “New Student Experience” (“NSE”). (R., at 8–9.) The administration’s goal in promulgating the NSE curriculum was twofold: first, it sought “to expose new students to WCC campus resources, culture, and values”; second, it aimed “to increase student engagement and increase retention, particularly among traditionally underserved student populations.” (R., at 8.)

The NSE pilot program required faculty members to dictate certain statements and viewpoint, offering them neither the ability to dissent nor distance themselves from the



institution's message. (R., at 8–9.) Jonah Smith, an experienced professor with tenure ambitions, expressed his concerns to administration over this material and his unwillingness to surrender his protected speech. (R., at 10.) In response, Albert Hall ("Hall"), Academic Dean of WCC, and Shelia Barrett ("Barrett"), Chair of the Philosophy Department, rescinded Smith's return offer. (R., at 10.)

Hall, Barrett, and WCC (together "Respondents") now seek refuge from Smith's compelled speech claim under the protection of the government speech doctrine, which strips away the First Amendment's requirement of government neutrality when the government, itself, speaks. *See, e.g., Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583, 1589 (2022). Against the great weight of this Court's precedents supporting a professor's unabated First Amendment rights in the classroom, the Thirteenth Circuit held that Jonah Smith's speech fell within the purview of the government speech doctrine, thereby barring it from the First Amendment's protections. (R., at 11.) This Court should reverse the decision of the Thirteenth Circuit and reaffirm the role of the First Amendment and academic freedom in public colleges.

### **STATEMENT OF FACTS**

#### **Smith's Employment History at Westland Community College**

In 2009, Jonah Smith, a PhD in philosophy, started working in the WCC Philosophy Department as an untenured professor. (R., at 4.) For a decade, Smith taught two introductory philosophy of law courses and two specialized philosophy courses. (R., at 4.) During his time at WCC, students lauded Smith's ability to create an engaging learning environment that spurred critical thinking and rigorous discourse. (R., at 4–5.) Although not required to publish scholarly papers, Smith regularly engaged in research and scholarship during his time at WCC in the hopes that he could earn a tenured position. (R., at 5.)

### **February 2019 Classroom Discussion in Smith's Philosophy of Law Course**

In February 2019, Smith facilitated an active class discussion in his Philosophy of Law course for his Section A students. (R., at 5.) Smith introduced a new topic: ethical legal representation, using as an example, local attorney and WCC faculty member Sally Sanders. (R., at 5.) Smith defended Sanders, who had publicly represented “disgraced businessman,” Martin Michelson in a recent lawsuit (R., at 5.) In the months prior, students had coordinated protests to prevent Sanders from teaching at WCC, and many reported being victimized by Michelson. (R., at 5.) To stimulate critical thinking, Smith presented the argument that Sanders was acting ethically in representing Michelson. (R., at 5.) Smith called upon one student to participate in the debate, but the student declined to engage. After class, some students approached Barrett to express their discontent with Smith's efforts. (R., at 6.)

In their discussion with Barrett, the students claimed to feel personally attacked by Smith's statements and generally discomfited with the discussion of Sanders, Michelson, and cancel culture. (R., at 6.) They furthered expressed their belief that Smith's classroom was no longer a safe learning environment. (R., at 6.) Some of these students subsequently posted about Smith's in-class comments on WCC's social media page. (R., at 6.) Notably, no students attributed Smith's speech to the university itself in either the meeting or the social media posts. (R., at 6.)

### **Respondents' Reaction to the Students' Classroom Feedback**

Barrett and Hall held a meeting with Smith to discuss the social media posts. (R., at 6.) Smith explained that his teaching approach was designed to help students navigate controversial issues, a crucial part of the curriculum. (R., at 6.) Barrett and Hall informed Smith that they would investigate further and asked him to refrain from discussing "cancel

culture" in the classroom. (R., at 6.) Smith expressed his disagreement with their position and the meeting concluded. (R., at 6.)

The next day, students in Smith's Section B Philosophy of Law class interrupted the lesson when Smith discussed the same content from the previous day. (R., at 7.) Several students walked out of the class in protest as Smith continued to teach, and those students went to the WCC social media page to call for Smith's termination. (R., at 7.) Thereafter, WCC removed Smith from teaching the Philosophy of Law course for the remainder of the semester but allowed him to continue teaching his two introductory Formal Logic courses. (R., at 7.)

#### **The NSE Curriculum and WCC's Conditions for Rehiring Smith**

By the spring of 2019, the NSE program was ready, and Hall approached Smith with a formal employment offer. (R., at 7.) Under the new contract, Smith's teaching load would include four courses: two Formal Logic courses and two Introductory Survey courses. (R., at 7.) Additionally, the program required Smith and other NSE professors to attend an NSE orientation session run by Hall. Following the session, professors would be required to adhere to the curriculum and guidelines adopted by the NSE committee and the WCC administration. (R., at 7–8.)

These guidelines introduced several procedural and substantive changes to teaching at WCC. For example, teachers at WCC had traditionally designed their own syllabus; but the NSE program mandated that instructors include certain provisions. (R., at 8.) First, WCC's policies as they pertained to diversity, accessibility, and civility policies, as well as WCC resources and campus information. (R., at 8.) Second, WCC's Land Use Acknowledgment clause, which included oaths of affirmation in opposition to Lockean property theory, Smith's primary research interest.<sup>1</sup> (R., at 8.)

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<sup>1</sup> As the Record reflects, Respondents concede on appeal that Smith's views are genuine and contravened by the Land Use Acknowledgement Clause. (R., at 8.) Therefore, if this Court were to

The NSE curriculum also included new classroom teaching requirements. (R., at 8.) Once a week, 20 minutes of class time would be devoted to promoting WCC community values. (R., at 8.) In this time, professors would discuss weekly NSE readings, as designated by the administration, and read aloud bullet points. (R., at 9.) After class, students were to submit written reflection papers to be read aloud by Smith to the students. (R., at 9.) The language Smith would be forced to use included, “*our* campus values ...” and “at WCC *we* value....” (R., at 9) (emphasis added.) According to Barrett, the purpose of the new curriculum was to build shared values, increase student engagement and retention, and help students of diverse backgrounds feel more comfortable in class. (R., at 9.) Barrett notified Smith that NSE administrators would be monitoring the NSE classes in order to assess the effectiveness of the new program. (R., at 9.)

Following the orientation, Smith arranged a meeting with Barrett and Hall to express his two main concerns with the NSE program. (R., at 9.) First, Smith was concerned that students may assume he believed in the Land Use Acknowledgement clause, and expressed a view of property directly opposed to his own. (R., at 9.) Hall informed Smith that the clause would be mandatory for all NSE courses. (R., at 9.) Smith suggested adding a disclaimer to the syllabus stating the clause did not align with his personal view, or alternatively, placing a link to the WCC website for students to access rather than the entire full clause. (R., at 9.) Hall rejected both of Smith’s solutions. (R., at 9.)

Second, although Smith had no objections to including NSE subject matter and assigning the extra readings for the course, he was concerned with the required bullet points in the NSE lesson plans. (R., at 9–10.) Smith raised a conscientious objection to teaching those bullet points in a manner that implied his personal adoption or endorsement of those views. (R., at 10.) Barrett and Hall dismissed Smith’s concerns. (R., at 10.) Still, Smith

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find that the government speech doctrine does not apply to the instant case, any balancing inquiry or test would be analyzed by the district court on remand.

proposed a compromise: after incorporating the viewpoints of WCC into the curriculum, he asked for the ability to present his own position and “engage the class in discussion recognizing multiple viewpoints[.]” (R., at 10.) Barrett and Hall rejected the suggestion and cautioned Smith that his NSE course would be monitored by WCC administrators. (R., at 10.) Smith was willing to look for a workable alternative approach but was reluctant to include the Land Acknowledgement clause into the syllabus or convey the bullet points as written due to the conflict they created with his academic views. (R., at 10.)

Shortly thereafter, Hall informed Smith that WCC has rescinded his contract offer for the fall 2019 semester. (R., at 10.) According to Hall, because Smith was unwilling to fulfill the curricular requirements, WCC would instead hire someone who would. (R., at 11.) Smith asked if he could continue to teach his Formal Logic courses or other courses that did not include the NSE curriculum. (R., at 11.) Hall declined his counteroffer. (R., at 11.) Smith subsequently filed a lawsuit against Hall, Barrett, and WCC. (R., at 11.)

### **SUMMARY OF ARGUMENT**

The Thirteenth Circuit Court of Appeals erred in affirming the district court’s denial dismissal of Smith’s First Amendment compelled speech claim. The courts below improvidently relied on the government speech doctrine outlined in *Garcetti v. Ceballos*, requiring Smith to adopt the government’s viewpoint.

Smith’s compelled speech claim must prevail for two reasons. First, the Respondents incorrectly attempt to define the speech in the instant case as government speech. Under *Shurtleff v. City of Bos., Massachusetts*, the Respondents fail to satisfy the requisite factors of the speaker analysis: the history of the expression, the public’s perception of the speaker, and the extent of the government’s control over the expression. Respondents fail to show that the reasonable member of the audience, a student in Smith’s classroom, would perceive his classroom instruction as speaking on behalf of WCC. Moreover, Respondents have not

shown a longstanding history of curricula like the NSE, which counsels against a holding of government speech.

Second, the Thirteenth Circuit failed to acknowledge this Court's precedent, which disallows the government from trying to force a public employee to adopt the viewpoint of the government as their own. As recognized in *Janus v. AFSCME*, members of the founding generation condemned laws similar in effect to the NSE curriculum. Accordingly, the lower court's decision as it pertains to the 12(b)(6) motion to dismiss Smith's 35 U.S.C. § 1983 claim must be reversed, and this case remanded back to the lower courts to apply an analysis consistent with this brief.

### ARGUMENT

#### **Respondents' Efforts to Compel Smith's Speech Against His Profoundly Held Academic Beliefs Violate His Fundamental First Amendment Rights and Do Not Adhere to the Government Speech Doctrine.**

The freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); see *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (“Since *all* speech inherently involves choices of what to say and what to leave unsaid ... one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say[.]”) (citing *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (internal quotations omitted)).

This powerful statement presupposes an even greater admonition—the government may not coerce citizens to adopt or convey a message. *Barnette*, 319 U.S. at 642 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

**A. *Freedom From Compelled Government Speech is a Fundamental First Amendment Protection Extending to Verbal Speech and Nonverbal Assertions***

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), this Court held that the First Amendment prohibited West Virginia from compelling public school children to recite the Pledge of Allegiance and salute the flag. *Id.* at 642. Observing that such a mandate invaded the “individual freedom of mind,” this Court recognized that such conformity is repugnant to the First Amendment. *Id.* Under *Barnette*, no law can compel an individual to deviate from this “fixed star.” *Id.* (“If there are any circumstances which permit an exception, they do not now occur to us.”).

Three decades later, in *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court extended *Barnette* to compelled speech which *indirectly* affirms a message, striking down a New Hampshire law imposing criminal sanctions upon Jehovah’s Witnesses who refused to display the state’s motto, ‘Live Free or Die,’ on their license plate. *Id.* at 707. In *Wooley*, this Court recognized that a flag salute involved a more severe infringement, as the display of a license plate less directly compels an individual to affirm a viewpoint. *Id.* at 715. However, it explicitly noted that this difference was one “essentially of degree.” *Id.* Inasmuch as the New Hampshire law required an individual to adopt a morally objectionable message, this Court required the showing of a sufficiently compelling state interest and no less drastic means for achieving the same basic purpose. *Id.* at 716–7.

These cases demonstrate two important principles: (1) states may not compel individuals to support a curricular message of orthodoxy directly, *Barnette*, 319 U.S. at 642; (2) nor can states compel individuals to engage in conduct which a third party would understand to be support of a message, *Wooley*, 430 U.S. at 707.<sup>2</sup> In any of these

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<sup>2</sup> Similarly, it cannot force businesses or individuals to pay money to support a program they would not otherwise support. See *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (holding that these protections apply to businesses compelled to pay monetary subsidies); see also *Janus*, 138 S. Ct.

circumstances, strict scrutiny applies. *Id.* at 716; see Clay Calvert, *Selecting Scrutiny in Compelled-Speech Cases Involving Non-Commercial Expression: The Formulaic Landscape of A Strict Scrutiny World After Becerra and Janus, and A First Amendment Interests-and-Values Alternative*, 31 Fordham Intell. Prop. Media & Ent. L.J. 1, 85 (2020) (discussing the importance of strict scrutiny in claims regarding compelled speech of opinions rather than compelled speech of facts).

If this Court were to—as the Respondents have argued it should—adopt a lower level of scrutiny for compelled speech claims in schools, then it would erode a fixed star of constitutional jurisprudence. See Joseph J. Martins, *The One Fixed Star in Higher Education: What Standard of Judicial Scrutiny Should Courts Apply to Compelled Curricular Speech in the Public University Classroom?*, 20 U. Pa. J. Const. L. 85, 135 (2017). Accordingly, this Court should reverse this case and remand it to the district court for application of strict scrutiny.

***B. The Speech Implicated In the Instant Case Does Not Fall Within Purview of the Government Speech Doctrine***

Government speech is not barred by the First Amendment. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). When the government is the speaker, the democratic electoral process serves as a check on that speech. *Id.* In line with this exception, the government may discriminate “on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.” *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

Opposite to government speech lies the compelled speech doctrine. The government may not “compel private persons to convey the government’s speech.” *Walker*, 576 U.S. at

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at 2463 (applying similar analysis to compelled subsidization of union dues). This line of cases and their modified scrutiny analysis set them apart from *Barnette* and *Wooley*. See *Janus*, 138 S. Ct. at 2463.



208. This Court has recognized that even government speech can raise free speech concerns. *Id.* at 219 (“Our determination that Texas’s specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons.”); see *Wooley*, 430 U.S. at 717, n.15 (observing that a vehicle “is readily associated with its operator” and that drivers displaying license plates “use their private property as a ‘mobile billboard’ for the State’s ideological message”).

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), this Court considered the following factors to determine whether the state of Texas spoke for itself: whether the forum in which the speech occurred had historically been used for government speech, whether the public would interpret the speech as being conveyed by the government, and whether the government had maintained control over the speech. *Id.* at 209 (finding that the state board had engaged in government speech because the license plates in question historically conveyed governmental ideologies, the public was likely to believe that messages on license plates were on the government’s behalf, and the state had “maintain[ed] direct control” over proposals and “actively” reviewed them).

In *Shurtleff v. City of Bos., Massachusetts*, this Court reaffirmed that these interpretations are evaluated via a holistic application of factors. 142 S. Ct. at 1589. They are guided by the history of the expression, the public’s perception as to who—the government or a private person—is speaking, and the extent of the government’s control over that expression. *Id.* (finding that the City of Boston’s flag approval process, which historically conveyed the government’s messages, was not governmental speech because observers could view the message as private, and the city had no meaningful involvement in the selection of flags).

As applied to university professors, circuit courts have looked to the nature of the professor’s speech. For example, the Sixth Circuit has held that a university requires a professor to provide “detailed advice to students about the administrative aspects of a

course.” See *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 591 (6th Cir. 2005). However, that professor could not be constitutionally compelled to “communicate the ideas or evaluations of others as if they were her own.” *Id.* at 595.

Under the great weight of circuit precedent, professors have no First Amendment interest in the formalities of teaching: grading, administrative duties, and ministerial conduct. See, e.g., *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) (“Because grading is pedagogic, the assignment of the grade is subsumed under the university’s freedom to determine how a course is to be taught.”).

However, in *Garcetti*, this Court noted the complex nature of claims involving classroom speech dedicated to the curricular subject matter and the need to protect the academic speech and viewpoint of college professors. See *Garcetti*, 547 U.S. at 425. And the majority of circuits have walked through this door. See *Meriwether*, 992 F.3d at 507 (collecting cases). But the Thirteenth Circuit, contrary to this Court’s strong consideration, altogether ignored this dictum. (See R., at 21.)

In the instant case, the Thirteenth Circuit held that Smith’s allegations were insufficient to state a claim, finding that the Respondents never required Smith to adopt their viewpoint as it pertains to the NSE curriculum. (R., at 21.) It reasoned that being required to speak “our values as WCC” and “WCC’s values as a community” fall short of constituting a First Amendment compelled speech claim. (R., at 21.) Further, it held that “being required to describe and convey the position of the government ... is *not* equivalent to requiring the employee to *personally* endorse the ideas.” (R., at 21.) Thus, the Thirteenth Circuit appears to have held—without analyzing—that Smith’s speech would be attributable to him as an officiant of the government, rather than as a private citizen.

The speech in question cannot fall under the government-speech doctrine as the Thirteenth Circuit contends. (R., at 18.) Further, the government cannot compel conformity

nor require a college professor to adopt a specific viewpoint on a matter of public concern. *See, e.g., Meriwether v. Hartop*, 992 F.3d 492, 510 (6th Cir. 2021).

*1. Smith Is Entitled in First Amendment Protections Because His Speech Does Not Meet the Shurtleff Government Speech Test*

In *Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583 (2022), this Court underscored that government speech is a holistic inquiry subject to no formulaic test. *Id.* at 1589. Under *Shurtleff*, courts examine the history of the expression, the public’s perception as to who is speaking, and the extent of the government’s control over the expression. *Id.*

Concerning the government’s control, it is clear that WCC exercised little control over Smith’s expressions made pursuant to curricular speech. Indeed, WCC continued to rehire Smith each year, fully aware of his distinctive and enigmatic teaching style. By contrast, the state board in *Walker* had “maintain[ed] direct control” over license plate designs by “actively” reviewing every proposal and rejecting at least a dozen. *See Walker*, 576 U.S. at 213; *see Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 472–473 (2009) (finding that Pleasant Grove City spoke for itself by erecting a monument because the City had “almost always” chosen the subject matter of monuments). Here, akin to *Shurtleff*, there is no “comparable record” of public colleges exercising control over faculty. *See Shurtleff*, 142 S. Ct. at 1589. University professors unquestionably occupy a public position beyond the “direct control” of the state. *Walker*, 576 U.S. at 213; *see Meriwether*, 992 F.3d at 507. Any speech by Smith is inherently his own—not WCC’s.

As to the reasonable observer prong, Justice Breyer’s analysis in *Shurtleff* focused on the fact that the City of Boston could have done more to clarify that it was speaking for itself. 142 S. Ct. at 1593 (“Boston could easily have done more to make clear it wished to speak for itself by raising flags.”). Justice Breyer pointed out that other cities provided text expressly declaring the intent to express their views. *See id.* (“The City of San Jose, California, for example, provides in writing that its ‘flagpoles are not intended to serve as a

forum for free expression by the public,’ and lists approved flags that may be flown ‘as an expression of the City’s official sentiments.’”) (further citation omitted). Like the City of Boston, WCC seeks to have its cake and eat it too. Neither the inclusions in the syllabus nor the classroom discourse clearly demonstrate that the *institution* is speaking, highlighting WCC’s lack of control. *Id.* If the syllabus had a carve-out similar to the one suggested by Justice Breyer, there would be no dispute that the speech was of government character.

Further, the record suggests that a reasonable student would perceive Smith’s speech to be his own, rather than WCC’s. For example, students generally attributed Smith’s speech to Smith himself. The record indisputably shows that students approached Barrett “to complain about *Smith’s* statements in class” because they felt “personally attacked by *his* criticisms.” (R., at 6) (emphasis added.) They felt “uncomfortable with *Smith’s* commentary.” (R., at 6.) (emphasis added.) This indicates that students deem Smith’s speech as attributable to him. Additionally, the record further shows that Smith is the sole lecturer in his classes, selects the majority of the curriculum, and facilitates class discussions. (R., at 4–5.) Reasonable observers would—and clearly did—believe that this was Smith’s personal speech. For this reason, they are likely to attribute future speech to him as well.

It is worth noting that while the government may have some interest in a public employee aligning their personal message with that of the public employer, the attributes of a college professor in a public school are afforded exceptions. B. Jessie Hill, *Compelled Speech: The Cutting Edge of First Amendment Jurisprudence: Look Who’s Talking: Conscience, Complicity, and Compelled Speech*, 97 Ind. L.J. 913, 917 (discussing the limits on government’s ability to compel the speech of a professor, especially when the government message is ideological in nature). The academic freedom exception maintains that a college or university professor has a stronger interest in preserving their academic viewpoint even when conveying a message on behalf of a public institution. *See Meriwether*, 992 F.3d at 506 (noting that the government cannot silence the viewpoint of a professor, especially viewpoints

that can spark insightful classroom discussion). Here, Smith's interest in his students being aware of his position as it pertains to the NSE message is supported by the academic freedom doctrine. *Id.* at 507 (“[A] professor's in-class speech to his students is anything but speech by an ordinary government employee.”).

Finally, the historical inquiry counsels in favor of Smith. In the government speech context, the historical background factor looks not to “general history.” *Shurtleff*, 142 S. Ct. at 1591. Rather, it looks at how the government tends to express its view via a certain medium of expression. This factor cuts both ways. Undoubtedly, there is a “general history” of the government expressing its views in grammar schools across America. But there is no such tradition amongst institutions of higher education, which have been, at times, the seat of government protests.

*2. The Government Can Neither Compel Conformity of Public University Professors Nor Require Them to Adopt the Government's Viewpoint as Their Own*

The foundation of compelled speech draws from the “general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” *Hurley*, 515 U.S. at 573. Under the thrust of the First Amendment, “members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed.” *Janus*, 138 S. Ct. at 2471. Free speech rights may be implicated, like here, where the government compels individuals to speak, even if the government is engaged in speech. *See Wooley*, 430 U.S. at 714. Even when it acts as speaker, the government cannot compel public officials to affirm nor adopt a viewpoint; it can only require them to state the government's position. *See Janus*, 138 S. Ct. at 2470.

The WCC Land Use Acknowledgement Clause, which Smith must include in his syllabus, plainly requires a value judgment presupposed by the *Hurley* court. *See Hurley*, 515 U.S. at 573. Similarly, the NSE program requires Smith to read out loud a document

saying, “*our* campus values include” and “at WCC, *we* value....” These statements force faculty members to *personally* endorse the values of WCC, thus triggering the First Amendment. See *Hurley*, 515 U.S. at 573. Thus, these policies involve directly compelling speech, *Barnette*, 319 U.S. at 642, or at least acting indirectly such that a reasonable observer could attribute the ideas to the speaker. See *Wooley*, 430 U.S. at 707.

Here, the Respondents attempt to force Smith not only to state WCC’s position, but to also adopt it as his own. This runs afoul of the spirit of the First Amendment: colleges may assign curriculums but cannot force their teachers to adopt the viewpoints of the government. See, e.g., *Kennedy v. Bremerton School District*, 597 U.S. \_\_\_\_ (2022) (“[T]he First Amendment’s protections extend to ‘teachers and students’ neither of whom ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse.’”) (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)). For example, a teacher may be required to teach their students the history of an American flag within a history class; however, that same teacher cannot be forced to pledge their allegiance to that flag or state that they believe in its values. See *Barnette*, 319 U.S. at 624. By not allowing Smith to clarify his personal position as to the NSE curriculum, the Respondents trampled on an essential constitutional right.

### CONCLUSION

Because the First Amendment limits a public college or university from compelling a professor’s speech when it conflicts with their deeply held academic beliefs, this Court should REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit and remand this case for further proceedings.

Respectfully submitted,  
Attorney for the Petitioner

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Journal(s)	University of Pennsylvania Law Review
Moot Court Experience	No

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**